

COPT.

Supreme Court of the United States

October Term, 1941

No. 530

THE NATIONAL BARK INC., APPELLANT,

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION AND MISSISSIPPI
VALLEY BARGE LINE CO., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO

FILED OCTOBER 21, 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 630

THE BARRETT LINE, INC., APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION AND MISSISSIPPI
VALLEY BARGE LINE CO., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO

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[fol. 3]

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO**

No. 881

THE BARRETT LINE, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, and INTERSTATE COMMERCE
COMMISSION, Defendants

COMPLAINT—Filed April 3, 1944

To the Honorable Judge of the United States District Court
for the Southern District of Ohio:

The Barrett Line, Inc., hereinafter referred to as the plaintiff, brings this suit in equity against the United States of America under an act of Congress approved October 22, 1913, known as the Urgent Deficiency Act, 38 Stat. L. 219, to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission made and entered June 18, 1943, in proceeding described as Docket W-353, *Barrett Line, Inc., Contract Carrier Application*, 250 I.C.C. 809, and in support of its prayer for relief plaintiff complains and says:

I

Plaintiff, The Barrett Line, Inc., a corporation with offices in Cincinnati, Ohio, is a contract carrier by water which is engaged in the transportation of property in interstate commerce on the Ohio and Mississippi Rivers in their tributaries. The plaintiff was incorporated under the laws of Ohio in 1926. It is the successor of Oscar F. Barrett, [fol. 4] who in turn was a successor of other members of the Barrett family. Plaintiff and its predecessors have been engaged in the transportation of property by water on the Mississippi and Ohio Rivers and their tributaries for more than one hundred years. Plaintiff is an irregular water carrier operator which performs special services under special contracts and special conditions. Its operations fluctuate widely both as to volume, as to the char-

acter of property handled and the territory covered. Plaintiff does a freighting business with its own barges and power and performs towage services for others. In addition, it does a chartering business that contemplates the handling of freight and the supplying of equipment to persons doing the chartering, and performs towing on a per diem basis.

II

On or about May 19, 1941, plaintiff filed an application with the Interstate Commerce Commission for a permit in accordance with the provisions of section 309 (f), (54 Stat. L. 942), the so-called "grandfather" clause of the Interstate Commerce Act, which sought authority to continue its operations as a contract carrier by water in the transportation of commodities generally except livestock, perishables, currency and certain other commodities. Subsequently, plaintiff filed a second application with the Commission under the provisions of section 309 (g) (54 Stat. L. 943) of the Interstate Commerce Act, which sought authority to perform the operations already described as new operations. These applications were prepared pursuant to the forms and the rules and regulations prescribed by the Interstate Commerce Commission.

III

The applications were assigned for hearing before G. H. Mattingly, an examiner of the Commission, and were heard [fol. 5] by the examiner on a consolidated record at Cincinnati, Ohio, September 1, 1942. At that hearing, appearances were made for water carriers which operate on the Ohio and Mississippi Rivers, namely, the Ohio River Company, the Mississippi Valley Barge Line Company, the Campbell Transportation Company, the Federal Barge Line and the Illinois River Carriers Association. Thereafter, the proposed report of the presiding examiner was prepared and served upon the parties. In that report the examiner found against the granting of the "grandfather" application filed under section 309 (g) of the Interstate Commerce Act, but found that the application for new operations should be approved by the Commission. Appropriate exceptions were filed to the examiner's report according to the interest of the parties. The applications were orally argued before Division 4 of the Commission,

after which it made and entered its report and order of June 18, 1943. A copy of that report and order is attached hereto and made a part hereof as exhibit A.

The Commission, Division 4, found that the applicant was not in bona fide operation on January 1, 1940, and continuously thereafter as either a common or a contract carrier by water in the performance of transportation subject to Part III of the Interstate Commerce Act. It reversed the conclusions of the examiner and, based upon the findings referred to, denied each application.

Thereafter, plaintiff seasonably filed a petition with the Commission for reconsideration and oral argument. That petition was denied by the Commission by its order of December 6, 1943. A copy of that order and that petition are attached hereto and made a part hereof as exhibits B and C.

IV

A duly certified copy of the record before the Interstate Commerce Commission in Docket W-353, Barrett Line, Inc. [fol. 6] Contract Carrier Application, including the applications of plaintiff, the transcript of the testimony and the exhibits, will be filed with the court.

The essential facts with respect to the plaintiff and its operations are as follows:

As of June 30, 1942, the plaintiff had assets of \$935,123.56, which included floating equipment valued at \$633,589.94, and United States bonds in the sum of \$256,700. It had a surplus and undivided profits of \$317,450.43, and a depreciation reserve of \$370,028.74. The equipment owned by the plaintiff at the time consisted of two towboats, twenty-one barges, two derricks and four small coal barges. At the time of the hearing two of the barges were being used in the coal trade, two in the transportation of bulk petroleum products, six were chartered to an oil company and were being used in the transportation of bulk petroleum products, six were in the process of being chartered to a shipper for the transportation of bulk products, and four were available for such use as applicant could find for them.

Plaintiff operates generally under term contracts which contemplate the movement of large quantities of material over a specified period of time. Under its existing rules

and regulations, plaintiff accepts commodities in barges in minimum lots of 500 net tons. Contracts are made for barge load lots. The period covered by contracts average from four to six months. The contracts are negotiated on the basis of the nature the volume of the cargo offered, the time required to make delivery, the course of the waterways, the season of the year and other factors which might affect the cost of performing the transportation.

The services performed by the plaintiff between January [fol. 7] 1, 1936, and September 1, 1942, are shown in the record before the Commission. The testimony of record shows that because of the highly sporadic and specialized nature of the services of plaintiff, no five year period would necessarily be representative of the scope and character of its services.

During the period referred to most of the cargo handled by plaintiff consisted of bulk commodities which may be handled by a water carrier without authority from the Interstate Commerce Commission by virtue of the so-called "exemption" provisions of section 303 of the Interstate Commerce Act. During the period in question, however, plaintiff handled such non-exempt commodities as fabricated steel and steel pilings, which transportation is subject to the provisions of the Interstate Commerce Act. The fabricated steel was transported in 1936. During that period plaintiff also chartered vessels to shippers. Such services are within the reach of Part III of the Interstate Commerce Act; but as to them the Commission erroneously found that in the absence of evidence showing the precise nature of the chartered services and the character of the commodities carried by the charterer, as well as the points between which the chartered vessels were moved, it would not be warranted in issuing a grandfather permit. And it apparently rejected the movement of fabricated steel in 1936 as insufficient because made several years prior to the grandfather date, which was January 1, 1940.

The evidence of record shows that in prior years plaintiff handled a variety of general cargo such as scrap iron, pig iron, fabricated iron and steel, ties, pipe, sulphur, coal, logs, lumber, salt, grain, sand, gravel, cement, paving blocks, automobiles and bauxite ore.

Plaintiff's barges are made of steel. They were designed [fol. 8] originally and were built with the idea and purpose

that at some future time they might or would be used to carry liquid cargo in bulk; but the necessary piping and fittings to carry such cargo in bulk were not installed at that time. Immediately prior to the grandfather date and since that time, the necessary pipe and fittings were installed so as to enable plaintiff to use the barges in transporting petroleum in bulk. During the period in question, the barges were used principally for that purpose. On account of the fuel oil and gasoline shortage, plaintiff was encouraged to convert the barges into oil-carrying barges by the Office of Defense Transportation and the Petroleum Administrator.

V

As hereinbefore shown, in addition to the application filed by plaintiff for grandfather rights under section 309 (f) of Part III it also filed an application for authority to establish new operations as described in section 309(g) of Part III. Under that section an applicant must show he is fit, willing and able properly to perform the service proposed, and that the service will be consistent with the public interest and the national transportation policy. The testimony shows that the applicant is fit, willing and able to engage in the transportation of general cargo, in addition to the transportation of petroleum products in bulk, at the end of the war emergency period, or at any time when conditions of trade and commerce justify the reconversion of the barges from oil-carrying barges to general cargo barges. While in its report, the Interstate Commerce Commission recognized that the transportation of petroleum in bulk by the plaintiff is a war emergency operation, which is obviously in the public interest, it nevertheless found that because the plaintiff is now engaged in the transportation of bulk commodities it is not entitled to a permit under section 309(g). On that premise the Commission found that plaintiff failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the national transportation policy.

VI

Plaintiff avers and charges that on the grandfather date, January 1, 1940, and continuously since, it was and is engaged under individual contracts or agreements in the transportation of interstate commerce for compensation,

and is, therefore, entitled to a permit under the provisions of section 309 (f) of the Interstate Commerce Act.

VII

Plaintiff avers and charges that it is a contract carrier by water engaged at present in the transportation of interstate commerce for compensation; that it is fit, willing and able properly to perform the service of a contract carrier, and to make upon reasonable notice special or individual contracts for the transportation of general cargo, as it has done in the past, and is in position to conform to the provisions of part III of the Interstate Commerce Act and the rules and regulations of the Interstate Commerce Commission thereunder, and as such is entitled to a permit under Section 309 (g) of the Interstate Commerce Act.

VIII

Plaintiff avers and charges that the order of the Interstate Commerce Commission here complained of unless set aside by this court will have the effect of limiting the services of plaintiff to the transportation of exempt commodities which will cause plaintiff irreparable injury and damage.

[fol. 10]

IX

Plaintiff avers and charges that the order of the Interstate Commerce Commission here complained of is null and void, is based on an erroneous and narrow construction of the provisions of the Interstate Commerce Act, is contrary to the national transportation policy as declared in that act, and is unlawful, arbitrary and capricious in that:

1. The order assumes that for a contract carrier by water to be entitled to a permit under the grandfather provisions of section 309 (f) (54 Stat. L. 942) it must have been engaged on or about the grandfather date, January 1, 1940, in the transportation of non-exempt commodities, whereas, under the provisions of section 302 (e) (54 Stat. L. 929) a contract carrier is defined as a person which under individual contracts or agreements "engages in the transportation by water of passengers or property in interstate of foreign commerce for compensation"; and under section 309 (f) such a carrier is entitled to a permit if on the

grandfather date it was "in bonar fide operation as a contract carrier by water."

2. The order gives no weight to the fact that for a long period of time plaintiff has been engaged in the transportation of a wide variety of commodities, some of which if transported singly and in bulk are exempt, and some of which are non-exempt commodities under the provisions of Section 303 (e) (54 Stat. L. 931) of the Interstate Commerce Act, and that plaintiff handled shipments of fabricated steel and piling a few years prior to the so-called "grandfather" date.

3. The order is based upon the erroneous assumption that because at the time of the hearing most of the equipment of the plaintiff was used in the transportation of bulk petroleum products, plaintiff is not entitled to a permit under section 309 (g) of the Interstate Commerce Act, although the record shows that plaintiff has four barges, not [fol. 11] used in the transportation of oil, which on short notice can be converted for use in the transportation of general cargo.

4. The order is based upon the erroneous assumption and conclusion that plaintiff has failed to show that it is proposing a new or continued operation, or that a new or continued operation by it, would be consistent with the public interest or the national transportation policy; since the record shows beyond doubt that the continued operation by plaintiff is and will be consistent with the public interest and the national transportation policy.

5. In entering the order, the Commission erred in reversing and in rejecting the findings of the examiner, which are that where, as here, the carrier has been engaged in transporting general cargo by water, for many years, consideration may, and should, be given to that fact, to the character of service rendered with respect to both regulated and unregulated traffic, and to the territory served during the period information is available with respect to such matters.

Wherefore, plaintiff being without adequate remedy at law, respectfully prays:

First: That upon the filing of this bill of complaint the presiding judge of this court shall call to his assistance in

the hearing and determination thereof two other judges, of whom at least one shall be a circuit judge:

Second: That process may issue against the defendants, the United States of America and the Interstate Commerce Commission, and that after not less than five days' notice to the Interstate Commerce Commission, and the Attorney General of the United States, as provided by law, a hearing [fol. 12] be held; that an interlocutory decree be issued staying and suspending said order of the Interstate Commerce Commission:

Third: That upon final hearing of this cause a permanent injunction issue decreeing that the order of the Interstate Commerce Commission is unlawful, null and void, and that it be set aside and annulled, and that its enforcement, execution and operation be forever enjoined, and that the United States of America and the Interstate Commerce Commission, their officers and agents, and others acting for them, be restrained from taking any steps or instituting or prosecuting any proceeding to enforce the aforesaid order, and that the plaintiff be given such other, further and general relief as may be proper, in the premises.

Respectfully submitted, Charles H. Stephens, Jr.,
Robert E. Quirk, Solicitors for Plaintiff. (S.)
Robert E. Quirk, (S.) Charles H. Stephens, Jr.

Address: Robert E. Quirk, Norman, Quirk & Graham,
Investment Building, Washington, D. C.

Charles H. Stephens, Jr., First National Bank Building,
Cincinnati, Ohio.

[fol. 13] EXHIBIT "A" TO COMPLAINT

This report will not be printed in full in the permanent series of Interstate Commerce Commission Reports.

Interstate Commerce Commission

No. W-353

Barrett Line, Inc., Contract Carrier Application

Submitted April 19, 1943. Decided June 18, 1943

1. Applicant found not to have been in bona fide operation on January 1, 1940, and continuously since, as a com-

mon or contract carrier by water, in the performance of transportation subject to part III of the Interstate Commerce Act.

2. New operation by applicant as a contract carrier not shown to be consistent with the public interest and the national transportation policy, and present or future public convenience and necessity not shown to require new operation by it as a common carrier. Applications denied.

Robert E. Quirk, for applicant.

Jack B. Jesselson, Harry C. Ames, Morris C. Pearson, W. G. Oliphant, Stuart B. Bradley, Luther M. Walter, Charles Donley, John S. Mason, R. Granville Gurry, Frederick M. Dolan, Andrew P. Calhoun, Wilbur LaRoe, Jr., Frederick E. Brown, and Arthur L. Winn, Jr., for interveners.

Report of the Commission

Division 4, Commissioners Porter, Mahaffie, and Miller

By Division 4:

Exceptions to the report proposed by the examiner were filed by the parties. Applicant replied to protestants' exceptions and the issues were argued orally. Our conclusions differ from those recommended by the examiner.

By application filed May 19, 1941, The Barrett Line, Inc., of Cincinnati, Ohio, seeks a permit under the provisions of section 309(f) of the Interstate Commerce Act authorizing continuance of its operation, as a contract carrier by water, in the transportation of commodities generally except certain commodities such as livestock, perishables, currency, contaminating cargo, etc., between points on the Mississippi River and its tributaries. A subsequent application, filed as a precautionary measure, seeks authority to perform the foregoing operation as a new operation. Both applications are in the alternative and request a certificate if applicant is found to be a common carrier. A hearing was held. The American Barge Line Company, Illinois River Carriers Association, Mississippi Valley Barge Line Company, and Union Barge Line Corporation oppose the granting of the applications.

[fol. 14] On June 30, 1942, applicant had assets of \$935,123.56 which included floating equipment valued at \$633,-

589.94, and United States bonds in the sum of \$256,700. It had a surplus and undivided profits of \$317,450.43 and a depreciation reserve of \$370,028.74. The equipment owned at the time of the hearing, September 1, 1942, consisted of 2 towboats, 21 barges, 2 derrick boats, and 4 small coal barges. The 2 towboats are of 900 and 1200 horsepower, respectively. At the time of the hearing 2 of the barges were being used in the coal trade, 3 in the transportation of bulk petroleum products, 6 were chartered to an oil company and were being used in the transportation of bulk petroleum products, 6 were in the process of being chartered to a shipper for the transportation of bulk petroleum products, and 4 were available for such use as applicant could find for them.

Applicant, or its predecessors, has been in operation on the Mississippi River and its tributaries for about 100 years. Ordinarily it operates under term contracts which contemplate the movement of large quantities of material over a period of time. The periods covered by such contracts are not less than 2 or 3 months, and average from 4 to 6 months. Contracts are negotiated on basis of the nature and volume of the cargo offered, the time required to make delivery, the course of the waterway, the season of the year, and other factors which might affect the cost of performing the transportation. Applicant has accepted single-trip shipments where special circumstances were involved but indicates that it does not intend to operate in the ordinary "run-of-the mine" trips.

An exhibit of record contains a description of all services performed between January 1, 1936, and August 11, 1942. During this period practically all services performed were such that they may be continued without any authorization from us because they are not subject to regulation under part III of the act. Stone, in bulk, petroleum products, in bulk, and fabricated steel and steel piling were the only commodities carried. Practically all of the stone was transported for the United States Army Engineers between points in Missouri, Illinois, Kentucky, Arkansas, and Tennessee and was used for construction work on the waterways. The transportation of bulk commodities is exempt from regulation under section 303(b). There were 7 movements of petroleum products in 1937 from Baton Rouge, La., to Louisville, Ky.; 3 movements in 1941, 1 from Vicks-

burg, Miss., to Grand Tower, Ill., 1 from Cairo to Alton, Ill., and 1 from Wicliffe, Ky., to Nashville, Tenn.; and 8 movements in 1942 from points in Louisiana to Midland, Pa., North Bend, Ohio, and Memphis, Tenn. The transportation of petroleum, in bulk, is exempt under the provisions of section 303(b) or (d). One shipment of fabricated steel and piling was handled in 1936 from Cairo to Genoa, Wis. There has been none since. Other services rendered during the period in question consisted of towing for other carriers or for shippers of bulk commodities, chartering vessels to carriers or to shippers, salvage operations, storage of vessels belonging to others, and furnishing steam to other vessels for boiler cleaning operations. Of the foregoing the only transportation which might be subject to regulation under part III was that of chartering of vessels to shippers. However, no showing is made as to the nature of the services rendered, the commodities carried in, or the points served with such vessels. On such [fol. 15] meager showing we would not be warranted in finding that applicant, on January 1, 1940, and continuously since, was engaged in chartering operations subject to part III of the act. In one instance a contractor's fleet of work boats was moved which operation was probably exempt by our order of October 29, 1941, in Ex Parte 147, *Towage of Floating Objects*.¹

Applicant maintains that owing to the varying and sporadic nature of its operations it is impossible to select any limited period of its existence as representative of its business. It claims to have handled a variety of commodities in the past, such as scrap iron, pig iron, fabricated iron and steel, ties, pipe, sulphur, coal, logs, lumber, salt, grain, sand, gravel, cement, paving blocks, automobiles, and bauxite ore, and seeks authority to handle commodities generally so that it will be in a position to again handle these or similar commodities should the occasion arise.

Under the act "grandfather" rights must be predicated upon a showing of bona fide operations on January 1, 1940, and continuously since. The term "bona fide operations" has been interpreted to mean a holding out substantiated by actual operations consistent therewith. Actual operations

¹ In *Towage of Floating Objects (Logs and Piling in Rafts)*, 250 I. C. C. 525, this order was vacated and insofar as it applied to logs and piling in rafts.

in order to substantiate a claimed holding out on January 1, 1940, must have been within a reasonable length of time from that date. What constitutes a reasonable length of time may vary with the particular circumstances in each proceeding but one shipment made in 1936 and others at an indefinite period of time prior thereto are entirely too remote to establish bona fide operations on January 1, 1940, and continuously since. We conclude that applicant has failed to establish that it was in bona fide operation on January 1, 1940, and continuously since, in the performance of transportation subject to part III of the act.

As previously stated applicant also filed an application under the provisions of section 309(g) seeking a permit authorizing the foregoing operation as a new operation. Under that section applicant must show that it is fit, willing, and able properly to perform the service proposed, and to conform to the provisions of part III, and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in the act.

Applicant, however, is not proposing any new operation. In fact, most of its equipment at present is being used in the transportation of bulk petroleum products. We recognize the fact that this present petroleum movement is an emergency operation occasioned by the war but even considering applicant's normal operations for a period of approximately 5 years before the war it has not shown that its operation consisted of performing other than exempt transportation, except for the one shipment of fabricated steel and piling in 1936. No evidence was submitted to show that present or future public convenience and necessity require operation by applicant in the performance of transportation subject to the act. On this record we conclude that applicant has failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity require such operation.

[fol. 16] We find that applicant was not in bona fide operation on January 1, 1940, and continuously since, as a common or contract carrier by water, in the performance of transportation subject to the provisions of part III of the

act; that it has not been shown that a new operation by applicant as a contract carrier by water would be consistent with the public interest and the national transportation policy; or that present or future public convenience and necessity require a new operation by it as a common carrier. The application, therefore, will be denied. An appropriate order will be issued.

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of June, A. D. 1943

No. W-353

Barrett Line, Inc., Contract Carrier Application

The Barrett Line, Inc., of Cincinnati, Ohio, having filed applications under the provisions of section 309(f) and (g) of the Interstate Commerce Act for a permit authorizing operation by it as a contract carrier by water, a hearing having been held, and full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That said applications be, and they are hereby, denied.

It is further ordered, That this order shall take effect and be in force from and after September 13, 1943.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

[fol. 17] EXHIBIT "B" TO COMPLAINT

ORDER

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 6th day of December, A. D., 1943.

No. W-353

BARRETT LINE, INC., CONTRACT CARRIER APPLICATION

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of petition of applicant for oral argument and reconsideration:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 18] EXHIBIT "C" TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket W-353

THE BARRETT LINE, INC. CONTRACT CARRIER APPLICATION

PETITION OF APPLICANT FOR RECONSIDERATION BY AND ORAL ARGUMENT BEFORE THE ENTIRE COMMISSION—August 25, 1943.

[fol. 19] Comes now the Barrett Line, Inc., applicant herein, and files this its petition for reconsideration by and for oral argument before the entire Commission, in support of which applicant respectfully shows:

1. That Division 4 in its decision of July 18, 1943, served June 26, 1943, erred in finding that applicant was not in bona fide operation on January 1, 1940, and thereafter as a contract carrier by water within the provisions of section 309 (f) of Part III.

2. Division 4 erred in finding that the application under section 309 (g) for authority to establish new operations be [fol. 20] denied because such operations are not shown to be

consistent with the public interest and the national transportation policy.

3. Division 4 erred in predicating its decision upon the proposition that a carrier by water which on the grandfather date and thereafter is engaged in the transportation of exempt commodities is for that reason not entitled either to grandfather rights or a permit to engage in new operations.

Argument in Support of Petition.

For convenience the nature of the applications and the essential facts will be restated. Applicant is a water carrier which has transported various commodities over the waters of the Mississippi and Ohio Rivers and their tributaries for many years. In fact, the applicant and its predecessors have operated over these waters for approximately one hundred years. The applicant is an irregular operator performing special services under special contracts and special conditions.

Two applications for authority to operate as a contract carrier by water were filed by applicant. One application is based on the grandfather provisions of section 309 (f) of Part III and the other application is based upon provisions of section 309 (g), which seeks a permit to establish new operations as a contract carrier of property by water. These applications were heard before Examiner Mattingly at Cincinnati, Ohio, September 1, 1942, on a consolidated record. In a well-reasoned and carefully prepared report, the examiner found that the applicant is not entitled to grandfather rights under section 309 (f) but is entitled to a permit to establish new operations under section 309 (g). [fol. 21] Exceptions were filed to these findings. The applications were orally argued before Division 4, which reversed the examiner in respect to his finding that applicant is entitled to a permit under section 309 (g).

The applicant performs two types of service, namely, tow boat service and barge service. It does a freighting business on its own barges and a towing business of barges owned by others. In addition it does a chartering business that contemplates the handling of both freight and the supplying of equipment to people doing chartering and also contemplates towing on a per diem basis. Applicant has never thought of itself as an operator serving

particular ports. Its policy is and has been to serve customers that could satisfy it that the transportation they wanted over the waterways in question would fit in with the traditional way in which the applicant does business. Applicant does not own or operate any terminals or terminal facilities. It issues no bills of lading or other billing. It simply makes invoices to its customers. It maintains no solicitors. When applicant is negotiating a contract with a prospective customer, competitive carriers are given little or no consideration. Its service is of such a special character as to justify the view that it does not compete with common carriers in any real sense. The truth is that the applicant and its predecessors have for many years, and at the present perform a special type of river service highly sporadic in character.

At present the applicant owns two tow boats and twenty-one barges. Applicant's barges were designed originally and were built with the idea that at some future time they would carry liquid cargo, but at that time the necessary [fol. 22] piping and fittings to carry oil were not installed. In order to convert the barges, which are steel, for use in transporting petroleum, the necessary pipes and fittings were installed. Since and prior to the grandfather date, the barges have been used in transporting bulk petroleum and its products. A water carrier may transport petroleum products in bulk without a permit from this Commission. Because on and since the grandfather date applicant's barges have been used for such transportation, Division 4 found that applicant is not entitled to either the grandfather rights claimed or to a permit to establish new operations.

It is clear that in enacting the Water Carrier Act Congress did not intend to restrict or impair this type of operation. If the Water Carrier Act is construed in the light of its language and its spirit, we are confident that the Commission upon reconsideration of the proceeding will reverse Division 4 and will grant the authority sought. The construction of the law as made by Division 4 will unduly restrict the operation of a water carrier such as the applicant and might, in fact, eventually put it out of business. Such a construction should be avoided unless the language of the act is so plain as to compel it. We submit that the act not only does not compel such a construction, but does not justify it.

We shall now examine and analyze the provisions of the pertinent sections of Part III for the purpose of demonstrating that Division 4 erred in its application of the law to the facts of this proceeding.

Section 302 (e), which defines a contract carrier by water, provides that it includes any person, etc. which under individual contracts or agreements engages in the transportation by water "of passengers or property in interstate or foreign commerce for compensation". It will be observed that this definition does not say that the water carrier must be engaged in the transportation by water of passengers or property which are not exempted by other sections of Part III. It states without equivocation that a contract carrier by water includes any person which under individual contracts or agreements engages in the transportation by water of "passengers or property in interstate or foreign commerce for compensation." Insofar as Division 4 considered section 302 (e) it is apparent that it read qualifications into that section which were not put there by Congress.

Section 309 (f) provides:

"Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: *Provided*, That subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time * * *."

The standard set up in section 309 (f), as to grandfather rights, is that the carrier or its predecessor was in bona fide operation as a contract carrier by water on January 1, 1940. Like section 302 (e) this section does not say that to be entitled to a grandfather permit the carrier must have been in bona fide operation as a contract carrier of property which is not exempted by other provisions of the [fol. 24] act. It is, therefore, clear that if this section is construed according to its language, the Commission is bound to hold that on the grandfather date and since the applicant has been engaged in bona fide operation as a contract car-

rier by water in the transportation of petroleum products. In the *Russell Bros. Towing Company* case, Docket W-385, decided by Division 4 August 12, 1942, the division said apropos of this question:

"It will be noted that in either instance is there any reference to whether the transportation performed by the carrier is or is not subject to regulation. In determining a carrier's status and the scope of its operations during the 'grandfather' period its entire operation should be considered, and not merely that part which the Congress has seen fit to make subject to regulation. To find that 'grandfather' rights may be granted only to the extent that a showing is made as to the performance of *regulated transportation requires the reading into the law of language which, in fact, is not there.*"

The decision of Division 4 in the instant case on this question is inconsistent with its decision in the *Russell Bros. Towing Company* case, and contrary to the statute. The decision here should also be compared with the decision of Division 4 of November 19, 1942, in Docket W-12, et al., *In The Application of The Moran Towing and Transportation Company, Inc.* Despite the fact that the business of Moran during the critical period was exempt, Division 4 gave it a certificate to continue operation as a common carrier in general towage service.

It is, therefore, clear that under the language of the pertinent provisions of Part III and under the decided cases, Division 4 erred in denying grandfather rights to [fol. 26] the applicant merely because during the critical period and since, the applicant has been engaged in the transportation of petroleum and its products in bulk, which are exempt commodities.

We shall now consider the application under section 309 (g) for a permit to establish new operations. As already shown, on and since the grandfather date the applicant has been engaged in the transportation in bulk of petroleum and petroleum products. It has been encouraged to engage in such transportation both by the Office of Defense Transportation and the Petroleum Administrator. There is no question as to applicant's fitness, willingness and ability to engage in the transportation of

other products by water at any time the occasion arises which justify a reconversion of its barges from oil-carrying barges to general cargo barges. As of June 30, 1942, it had assets of \$935,123.56, which included floating equipment valued at \$633,589.94, and United States bonds in the sum of \$256,700. It had a surplus and undivided profits of \$317,450.43, and a depreciation reserve of \$370,028.74. While Division 4 recognized that the present petroleum movement by applicant is an emergency operation occasioned by the war, it nevertheless refused to grant a permit to the applicant under section 309 (g) because during a period of approximately five years before the war the principal operations of applicant were in handling exempt transportation except for one shipment of fabricated steel and piling which moved in 1936.

The examiner's treatment of this question is more in keeping with the language and spirit of the statute and with the facts than is the decision of Division 4. Apropos [fol. 26] of this subject the examiner said on Sheet 7 of his report:

"It therefore becomes necessary to consider the application for a permit under section 309 (g). The granting of a permit under this section is not contingent upon a showing of the nature of the business engaged in during any specific period; the requirements being that the applicant is fit, willing, and able to perform the service proposed; that such operation shall be consistent with the public interest and the national transportation policy as declared by the act; and that the business of the applicant and the scope thereof shall be specified in the permit.

"In determining these various matters it is appropriate to take a much broader view of the situation than in connection with the determination of 'grandfather' rights. Where applicant is and has been engaged in business similar to that for which the permit is sought, consideration may and should be given to its historical background, to the character of service rendered with respect to both regulated and unregulated traffic, and to the territory served, during whatever period information is available with respect to such matters.

"The nature and extent of applicant's operations at present, and extending back over a long period of years, coupled with the evidence of record showing that it desires to continue such operations and has sufficient facilities and financial resources to do so, warrant the conclusion that applicant is fit, willing, and able to perform the service proposed.

"As previously indicated, applicant has at various times transported quite a wide variety of commodities and it may at any time desire to transport these or other commodities. It also has engaged in towing for, and chartering of equipment to, shippers."

[fol. 27]. The examiner is sound in his construction of the law and should be sustained by the entire Commission. Under section 309 (g) an application for a permit shall be granted if the Commission finds that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of Part III, etc. and that such operation will be consistent with the public interest and the national transportation policy declared in this act. This section does not contain a requirement that a permit will be issued only if the applicant is engaged or will immediately engage in the transportation of non-exempt commodities. While the Commission is given authority by that section to specify the business of the carrier and the scope thereof, there is no requirement that the business must consist of non-exempt commodities. Division 4 has given the statute a narrow and unjustified construction, and one which will hinder rather than foster and develop water transportation, the principal aim of Congress in enacting Part III.

The evidence in this case clearly establishes that applicant is in position to reconvert the barges for use in transporting general cargo on short notice. There is no reason to suppose that with the return of normal conditions applicant will not resume the transportation of general cargo, including commodities which are not exempt. The applicant should not suffer because it has seen fit to convert its barges into oil-carrying equipment in the face of the urgent need of petroleum and its products in the eastern part of the United States during the past several years. It should be commended for doing so. Applicant is actually engaged in the transportation of property by water over the rivers in

[fol. 28] question. Even under its own theory, the action of Division 4 here is inconsistent with its decisions in connection with applications of coastwise and intercoastal water carriers such, for example, as the *Southern Pacific* case (Morgan Line), 250 I. C. C. 457; and the *American Hawaiian Steamship* case, 250 I. C. C. 219, and others. In those cases the applicants had ceased operating in coastwise and intercoastal service as water carriers. Moreover, in granting the applications, the Commission imposed a provision in its order that the authority was granted on the condition that the applicant exercise such authority. The applicant is not here challenging the correctness of the decisions of Division 4 in those cases. It does feel, however, that if this Commission is justified in granting authority to applicants who are not engaged in any water carrier service at the time the certificate is issued and are not in position to engage in such service, it certainly ought not to hesitate to issue a permit to the applicant here, which is now, and during the critical period, has been engaged in water carrier service, although of exempt commodities, and is in position with the return of normal conditions immediately to reconvert its oil-carrying barges into general cargo barges.

Applicant has been asked to make contracts for the transportation of logs and other non-exempt commodities. It has been unwilling to do so for the time being because of the importance of continuing the transportation of petroleum and its products. The Commission should keep in mind that under the construction applied by Division 4 in this instance, the regulated carrier will be placed in a preferred position because it can handle both exempt and non-exempt traffic to the extent its equipment will permit, and if additional [fol. 29] equipment or facilities may be necessary he can arrange to obtain them with confidence. On the other hand, under the decision of Division 4 here, the water carrier which for the time being is handling exempt commodities, if denied a permit to handle other commodities, will be limited to the handling of exempt commodities. In addition, if such a carrier desires to engage in handling non-exempt commodities he must secure a permit from this Commission, which usually takes considerable time and as to the outcome of which there is more or less uncertainty. This would prevent such a carrier from mak-

ing the necessary financial commitments for additional equipment, etc. In other words the interpretation which Division 4 has placed upon the statute will put a carrier such as the applicant at a very distinct and definite disadvantage as compared with other water carriers.

Applicant's operations are in many respects unique. Its operations are special in the highest degree. It serves customers and the river landings as the occasion requires. Applicant and its predecessors have been performing this special kind of service for more than one hundred years. As O. Slack Barrett, president of the applicant testified; because of these special conditions no five year period of the operation of applicant would necessarily be representative of its wide range of activities. There have been elapsed periods of inactivity between the conclusion of one trade or contract and the engagement of another. There have also been long periods in which one trade has practically absorbed the activities of applicant, such as, for example, its present activity in the transportation of petroleum in an effort to assist in the war emergency. The examiner gave these and other facts great weight [401.30] in recommending that the authority sought under section 309 (g) be granted. In doing so, he was right on principle and on precedent. The Commission itself has given this character of evidence controlling weight in disposing of various applications under both the Water Carrier Act and other acts administered by it. See in this connection *John L. Goss Corp.*, 250 I. C. C. 101, 103; *Choctaw Transportation Co.*, 250 I. C. C. 106, 107; *Reidville Oil & Guano Co.*, 250 I. C. C. 71, 73; and the recent decision of Division 4 in Docket FF-148, *Republic Forwarding Company* case.

One of the purposes of the Water Carrier Act is to encourage, foster, develop and promote transportation by water in all of its forms. The hearings before the committee of Congress were extensive. Congress knew that water carrier transportation had been conducted under a variety of special circumstances and conditions unknown to transportation by rail and by highway. The Commission will unwittingly defeat the purposes which Congress had in mind in enacting Part III, unless it gives consideration to these various special circumstances and conditions under which water carriers have operated and interprets the law in a manner that will give them effect. The

decision of Division 4 circumscribes the provisions of the Water Carrier Act to a degree not justified by its language.

In considering the application under section 309 (g), the Commission must look to the future as well as to the past, and in doing so it has a right to assume, in the light of the testimony of witness Barrett, that applicant will in the future, as it has in the past, make special contracts and perform special services as to non-exempt commodities, either before or after the resumption of normal [fol. 31] conditions. The very absence of continuity during particular periods of the same kind of service as may have been performed by applicant in other periods is one of the outstanding characteristics of its operations, and is one of the facts which distinguish it from a common carrier and from many contract carriers, and which, with other facts, show why the Commission should not dispose of this application on the theory and narrow construction of the law adopted by Division 4.

Conclusion

As stated earlier in this petition, both the spirit and the letter of the Water Carrier Act require a more comprehensive view of water carrier transportation than has been given by Division 4. Moreover, the decision of Division 4 is neither justified by the facts nor by the language of the statute. If that decision is sustained as the policy of the Commission in cases of this kind, the result will be most unfortunate to the carriage of commerce by water. For the reasons stated, the decision of Division 4 should be reversed, and the Commission should find that the applicant is entitled to the authority sought.

Respectfully submitted, Robert E. Quirk, Norman,
Quirk & Graham, Attorneys for Applicant, 1116
Investment Building, Washington, D. C.

August 25, 1943.

[fol. 32]

CERTIFICATE OF SERVICE.

I hereby certify that I have on the 25th day of August, 1943, served a copy of the foregoing document on all parties of record in this proceeding by mailing a copy thereof properly addressed and with postage paid.

Robert E. Quirk, Attorney.

[fol. 33] • IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed May 16,
1944

Now comes the United States of America, one of the defendants in the above-entitled action; and for answer to the complaint herein answers and says:

1. This defendant admits the allegations contained in paragraphs I, II, III, and V (the complaint does not contain any paragraph numbered IV), to the extent that they allege matters of fact and not conclusions of law or inferences of the pleader, and insofar as they are not inconsistent with the statements contained in the report and order of the Interstate Commerce Commission of June 18, 1943, attached as Exhibit A to the complaint.

2. This defendant denies the allegations of paragraphs VI, VII, and IX, to the extent, if any, that they relate to matters of fact as distinguished from conclusions of law or inferences of the pleader; and this defendant does not acquiesce in, but differs with, the conclusions of law set forth in the said paragraphs.

[fol. 34] • 3. This defendant admits that the order of the Interstate Commerce Commission referred to in paragraph VIII will have the effect of limiting the services of plaintiff to the transportation of exempt commodities (unless plaintiff obtains from the Commission, upon proper proof, other appropriate authority covering transportation of commodities subject to regulation under part III of the Interstate Commerce Act); but this defendant denies that such limitation will cause plaintiff irreparable injury and damage, or any injury or damage actionable at law.

4. Except as herein expressly admitted, this defendant denies each and all of the allegations contained in the complaint.

Wherefore, this defendant prays that the relief prayed for by plaintiff be denied, and that plaintiffs' complaint be dismissed at plaintiff's costs.

(S.) Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C. Wendell Berge, Assistant Attorney General. Leo C. Crawford, United States Attorney.

[fol. 35] I certify that a copy of the foregoing answer was this day mailed to each of the following persons:

Charles H. Stephens, Jr., 1502 First National Bank Building, Cincinnati, Ohio.

Robert E. Quirk, Norman, Quirk and Graham, Investment Building, Washington, D. C.

Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Washington 25, D. C.

Herman A. Bayless, Union Central Life Building, Cincinnati, Ohio.

Wilbur LaRoe, Jr., Investment Building, Washington 5, D. C.

Harry C. Ames, Ames, Hill and Ames, Transportation Building, Washington 6, D. C.

Edward Dumbauld, Special Assistant to the Attorney General.

May —, 1944.

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed May 19, 1944

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's complaint contained, for answer thereto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the general allegations of the complaint, the Commission admits that the Court has jurisdiction of the action herein, and of the parties thereto.

II

Answering the allegations of paragraph I of the complaint, the Commission upon information and belief and for other purposes of this action, admits that plaintiff is

[fol. 37] a corporation with offices in Cincinnati, Ohio, and that it has for a number of years engaged in some sort of water carrier operations on the Mississippi and Ohio rivers and their tributaries, but denies that such operations were those of a common or contract carrier subject to the provisions of the Water Carrier Act (54 Stat. L. 929) requiring the issuance of a certificate or a permit, and that such operations were in fact of the kind or character made exempt from the regulations of said Act.

III

Further answering the allegations of the complaint, the Commission alleges that proceedings involved in this action were instituted before the Commission upon the filing by plaintiff on May 19, 1941, of an application for a permit under provisions of Section 309(f) of the Interstate Commerce Act, Part III, (49 USC 909), seeking authority to operate as a common carrier by water in interstate commerce over the Mississippi and Ohio rivers and their tributaries; that said application was given docket designation of W-353, and in said proceedings the parties thereto, including plaintiff herein, were and each of them was, accorded the full hearing provided in and by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon matters covered in and by the report and order of the Commission, hereinafter referred to and identified, were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiff herein by its counsel; that in said hearings and subsequently in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for its determination, on behalf of said plaintiff [fol. 38] tiff by its counsel, including many of the questions raised by the plaintiff in this action; that following hearings and the recommended report and order of the examiner, the Commission by and through Division 4 entered its report and order of June 18, 1943. (Exhibit A to the complaint), under the terms of which the said application was denied, on the ground that the operations shown to have been engaged in, as required by said statutes, are and were exempt from the regulations provided; that plaintiff filed a second application with the Commission

on May 22, 1942, seeking a permit under provisions of Section 309(g) of the Interstate Commerce Act, Part III, (49 USC 909), which said application was heard, considered and decided, together with the first application under Section 309(f) and was also denied, on the ground that the applicant had failed to show that it proposed any new operation or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present and future public convenience and necessity required such operation; that plaintiff's petition to the Commission for reconsideration, thereafter filed, was denied at a general session by order of December 6, 1943 (Exhibit B to the complaint); that said order of the Commission, by its terms, and under various orders extending the effective date thereof, became effective on December 27, 1943.

The Commission further alleges that the findings and conclusions in said report and order were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid, and that in making said report it considered and weighed carefully, in the light of its own knowledge and experience, [fol. 39] each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel.

The Commission further alleges that said report and order, hereinabove referred to, were not made or entered either arbitrarily or unjustly, or without proof or contrary to the relevant evidence, or without evidence to support them; that in making said report and order the Commission did not exceed the authority conferred upon it by law, and the Commission denies each of and all the allegations to the contrary contained in the complaint.

IV

Specifically answering the allegations of paragraph 8 of the complaint, the Commission denies that its order herein has or will have the effect of causing irreparable injury or damage to the plaintiff.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclu-

sions of fact included in said report and order, hereinabove referred to.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, by Allen Crenshaw, Attorney. Daniel W. Knowlton, Chief Counsel, of Counsel.

[fols. 40-60] : *Duly sworn to by Claude R. Porter. Jurat omitted in printing.*

[fol. 61] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 881

THE BARRETT LINE, INC., Plaintiff,

VS.

THE UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, Defendants

Before Allen, Circuit Judge, and Nevin and Druffel, District Judges

DECISION—Filed July 28, 1944

PER CURIAM:

The Court is of opinion that the Interstate Commerce Commission did not misconstrue the applicable statute, nor misapply it, and that its action herein has been in conformity with its statutory authority.

The Order of the Commission was entered after a full and fair hearing. The Commission did not abuse its discretion, nor act arbitrarily in entering its Order. The complaint herein should be dismissed at plaintiff's costs.

The Court adopts as its own findings of fact and conclusions of law, without repetition here, the findings and conclusions of Division 4 of the Interstate Commerce Commission, as set forth in its decision June 18, 1943, in proceeding No. W-353, and the conclusion of the Interstate

Commerce Commission in its order in the same proceeding entered on December 6, 1943.

Accordingly, the Court has entered an Order dismissing the complaint at plaintiff's costs.

(S.) Florence E. Allen, Judge, United States Circuit Court of Appeals; Robert R. Nevin, Judge, United States District Court; John H. Druffel, Judge, United States District Court.

[fol. 62] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION ✓

No. 881

THE BARRETT LINE, INC., Plaintiff,

vs.

THE UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, Defendants

ORDER DISMISSING COMPLAINT—Filed July 28, 1944

This day this cause came on to be heard and was submitted on the pleadings and the evidence and the Court having heard the arguments of counsel and being fully advised in the premises finds that the prayer of plaintiff's complaint should be and it is denied, and that the complaint herein should be dismissed.

It is, therefore, by the Court ordered, adjudged and decreed that the complaint herein be and hereby it is dismissed at plaintiff's costs. To all of which findings, rulings, judgment and decrees of the Court, plaintiff excepts.

(S.) Florence E. Allen, Judge, United States Circuit Court of Appeals; Robert R. Nevin, Judge, United States District Court; John H. Druffel, Judge, United States District Court.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed September 15, 1944

The Barrett Line, Inc., plaintiff herein, being aggrieved by the final order or decree of the Court hereinbefore made and entered on July 28, 1944, in the above-entitled cause, prays an appeal therefrom to the Supreme Court of the United States.

The particulars wherein plaintiff considers the final order or decree erroneous are set forth in the Assignment of Errors filed herewith and to which reference is hereby made.

Plaintiff prays that citation be issued as provided by law and that a transcript of the record, proceedings, and documents on which the final decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Dated September 15th, 1944,

(S.) Charles H. Stephens, Jr., First National Bank Building, Cincinnati, Ohio; Robert E. Quirk, Investment Building, Washington, D. C., Attorneys for Appellant.

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed September 15, 1944

Comes now plaintiff, The Barrett Line, Inc., and, in connection with its petition for appeal, submits the following Assignment of Errors committed by the District Court of the United States for the Southern District of Ohio, Western Division, in the course of the proceeding and in and by the decision of July 28, 1944, and the terms of final decree passed and entered by the Court on July 28, 1944, in the above-entitled cause:

1. The said District Court erred in that it decreed that the complaint of The Barrett Line, Inc., be denied and dismissed and that the United States of America and the

Interstate Commerce Commission have judgment against the plaintiff, notwithstanding that as specifically alleged in said complaint, and firmly established by proof, the order of June 18, 1943, of the Interstate Commerce Commission, as set forth in the complaint and the exhibits therein referred to, then and now complained of were and are illegal and should be held to be void, because: The said Commission misconceived and misapplied its statutory duty and acted arbitrarily and capriciously and contrary to the evidence.

2. The said District Court erred in finding that the Interstate Commerce Commission did not misconstrue the applicable statute, nor misapply it, and that its action was in conformity with its statutory authority.

3. Said District Court erred in finding that the Commission did not abuse its discretion, nor act arbitrarily, in entering said order.

[fol. 65] 4. Said District court erred in failing to find that the order of the Commission is based upon the erroneous premise that for a contract carrier by water to be entitled to a permit under the so-called "grandfather" provisions of section 309 (f) (54 Stat. L. 942) of the Interstate Commerce Act it must have been engaged on and since January 1, 1940, in the transportation of non-exempt commodities, whereas under the provisions of section 302 (e) (54 Stat. L. 929) a contract carrier by water is defined as a person which under individual contracts or agreements "engages in the transportation by water of passengers or property in interstate or foreign commerce for compensation" and that under section 309 (f) such a carrier is entitled to a permit if on the "grandfather" date and thereafter it was "in bona fide operation as a contract carrier by water".

5. The said District Court erred in failing to find that the Commission acted arbitrarily and contrary to the statute in holding that although on, before and since the "grandfather" date, January 1, 1940, the plaintiff engaged in 23 chartering transactions under which it leased or chartered its vessels to various shippers, none of whom are carriers subject to the Interstate Commerce Act, plaintiff was nevertheless not engaged in bona fide operation as a contract carrier by water.

6. The said District Court erred in failing to find that the order of the Commission gives no weight to the fact that for a long period of time plaintiff has been engaged in the transportation of a wide variety of commodities as a contract carrier by water.

7. Said District Court erred in failing to find that the order of the Commission is based upon the erroneous assumption that because at the time of the hearing most of the equipment of plaintiff was used in the transportation of bulk petroleum products, plaintiff is not entitled to a permit under section 309 (g) of the Interstate Commerce Act, although the record shows that plaintiff has four barges, not used in the transportation of oil, which barges, as well as other barges, can be converted for use [fol. 66] in the transportation of general cargo.

8. The said District Court erred in failing to find that the order of the Commission is based upon the erroneous assumption and conclusion that plaintiff failed to show that it is proposing a new or continued operation, or that such an operation would be consistent with the public interest or the national transportation policy, since the record shows beyond doubt that the continued operation by plaintiff is and will be consistent with the public interest and the national transportation policy.

9. Said District Court erred in failing to find that the Commission acted arbitrarily and contrary to the statute and the evidence in rejecting the findings of the examiner who heard the case and who concluded that the continued operation by plaintiff will be consistent with the public interest and the national transportation policy.

10. Said District Court erred in declining to enjoin and annul the order of the Interstate Commerce Commission as prayed.

(S.) Charles H. Stephens, Jr., First National Bank Building, Cincinnati, Ohio; Robert E. Quirk, Investment Building, Washington, D. C., Attorneys for Appellant.

[fol. 67] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed September 21, 1944

To the United States of America, the Interstate Commerce Commission, Mississippi Valley Barge Line Company, Campbell Transportation Company, American Barge Line Company, Union Barge Line Corporation, or Their Counsel, and the Attorney General of Ohio:

Please take notice that pursuant to the statutes and rules of Court in such cases made and provided, The Barrett Line, Inc., plaintiff in the above-entitled cause, has appealed and does hereby appeal to the Supreme Court of the United States, from the final decree of the above-entitled Court made herein and entered on July 28, 1944, and from each and every part thereof.

Dated September 19th, 1944.

(S.) Charles H. Stephens Jr., Robert E. Quirk,
Attorneys for Appellant.

[fol. 68] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed September 15, 1944

The plaintiff in the above-entitled case, having prayed for the allowance of an appeal in the above-entitled cause to the Supreme Court of the United States from the decree made and entered in the above-entitled cause by the above-entitled Court, on the 28th day of July, 1944, and from each and every part thereof, and having presented and filed its Assignment of Errors and statement as to jurisdiction, pursuant to the statutes and rules of Court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby allowed as prayed, and made returnable within forty (40) days from the date thereof, and the Clerk is directed to transmit to the Supreme Court of the United States a proper authenticated transcript of rec-

ord, proceedings, and papers on which the decree was made and entered.

And it is further ordered that security for costs on appeal be fixed in the sum of Two Hundred and Fifty Dollars, (\$250.00).

Dated September 15th, 1944.

(S.) John H. Druffel, United States District Judge.

[fols. 69-73] Citation in usual form, filed Sept. 15, 1944, omitted in printing.

[fols. 74-75] Certificates to following transcript omitted in printing.

[fol. 76]

Filed May 19, 1941
WC 353

APPLICATION

For.

☐ CERTIFICATE AS COMMON CARRIER BY WATER☒ PERMIT AS CONTRACT CARRIER BY WATER

SUBJECT TO THE INTERSTATE COMMERCE ACT

(Before answering, read general instructions attached hereto.)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of

THE BARRETT LINE, INC.

(Name)

(Trade Name)

Incorporated in Ohio, See Exhibit "C"

(Status as individual, partnership, association, corporation, fiduciary, etc. If a corporation, name the State of incorporation. If a partnership, give names and addresses of all partners. If an association or corporation, attach a list of names and addresses of directors and officers.)

1121 Chamber of Commerce Bldg., Cincinnati, Ohio

(Street address)

(City)

(State)

Application below is for the appropriate authority to: (check applicable status)

☒ to continue an operation
in existence January 1,
1940, and continuously
thereafter☐ common
carrier☐ passengers

) as a

) of

☐ to continue an operation
not existing January 1,
1940, but existing
February 1, 1941☒ contract
carrier☒ property

by water in interstate or foreign commerce (as defined in section 302(i))

Application for certificate as common carrier of property covers

☐ all commodities☐ commodities with exceptions as detailed in Exhibits "A"
or "B"

Application for a contract carrier permit of property covers

☒ all commodities with exceptions as detailed in Exhibits "A"
or "B"☐ specific commodities as detailed in Exhibits "A" or "B"Application covers ☐ regular routes☒ irregular routes

BWC 2b

[fol. 77]

Operation is ☒ year around
☐ seasonal between _____ and _____
(month) (month)

In support of this application, applicant submits the following exhibit attached hereto and made a part hereof:

☒ Exhibit "A" ☒ Exhibit "B"

(See General Instructions)

Applicant will furnish such additional information to substantiate the applicant's prayer as the Commission may require.

Applicant has complied with the order of the Commission relative to the service on interested parties, as shown below.

Applicant reserves the right to claim exemption from any and all provisions of Part III of the Interstate Commerce Act, the filing of this application not being deemed a waiver thereof, and the operations, if any, which applicant believes to be exempt are those described below:

(If exemption is claimed in respect of any operations applicant should here describe such operations, and in each instance make reference to the statutory provision or provisions under which the exemption is claimed)

See Exhibit "D"

WHEREFORE, The applicant herein prays: That the Commission
Permit

issue a _____ to operate as a _____
(Certificate) (Permit) (Common Carrier)

Contract Carrier property generally with exceptions as detailed

of _____
(Contract Carrier) (Passengers) (Property generally, or with excep-
in Exhibit "A"

tions, or specific commodities only, as detailed in Exhibits "A" or "B"
and applicant further prays that if the facts herein contained show
that applicant, although applying for a _____ Permit

_____ (Certificate) (Permit)
Certificate
is entitled to a _____, this application be considered
(Permit) (Certificate)

one for the appropriate form of authority.

Dated this 14 day of May, 1941.

The Barrett Line, Inc.

(Applicant)

(Signed) By O. Slack Barrett (Title) President

BWC 2c

[fol. 78]

OATH.

State of Ohio)
 County of Hamilton) ss:

O. Slack Barrett makes oath and says that he is the President
 (Name of affiant) (Title of affiant)

of the Barrett Line, Inc.; that he is authorized on the part of said
 (Name of applicant)

applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached hereto and made a part hereof; that he has carefully examined all of the statements contained in such application and the exhibits attached thereto and made a part thereof; that he has knowledge of the matter set forth therein, and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

(Signed) O. Slack Barrett

Subscribed and sworn to before me, a notary in and for the
 State and county above named, this 14th day of May, 1941.

(SEAL)

(Signed) Clara M. Vorbroker

My commission expires April 26, 1944.

CERTIFICATE OF SERVICE

A copy of this application has been served by receipted mail on the Governors of the following States:

Alabama	Kentucky	Ohio	Wisconsin
Arkansas	Louisiana	Pennsylvania	Indiana
Illinois	Minnesota	Tennessee	Missouri
Iowa	Mississippi	West Virginia	

A notice of the filing of this application (Form B. W. C. 5) has been served by receipted mail on the following known waterline competitors:

See Exhibit "E".

Postal receipts or certificates of mailing covering the above are attached hereto.

Date May 14, 1941.

The Barrett Line, Inc.

Signed O. Slack Barrett,
O. Slack Barrett, President.

BWC 2d

[fol. 79]

EXHIBIT "A"

(This exhibit to be filled out by applicants for common carrier certificates or contract carrier permits claiming status under the provisos of section 309(a) or 309(f) of the Interstate Commerce Act.)

The Barrett Line, Inc.

(Name of Applicant)

Except as otherwise noted, the following information is to be as of January 1, 1940. The information given should, where necessary, cover a sufficient period prior to such date to give a clear and fair picture of the nature and extent of the business of applicant which properly should be covered by the certificate or permit sought. Wherever changes in the nature or extent of the operation have been made since January 1, 1940, they should be clearly indicated.

DESCRIPTION OF TRANSPORTATION SERVICE, ROUTES, PORTS SERVED REGULARLY AND IRREGULARLY, AND OTHER PERTINENT INFORMATION

I. DESCRIPTION OF TRANSPORTATION SERVICE:

A. Applicant (or predecessor in interest) was engaged in the business of transporting, in interstate or foreign commerce:

(1) ☐ Commodities generally.

(2) ☒ Commodities generally, except See Exhibit "F",
(indicate exceptions,

either specifically or by their general nature)

(3) ☐ Special commodities _____
(indicate specifically

commodities transported)

(4) ☐ Passengers.

B. Applicant (or predecessor in interest) undertook to transport passengers or property for the general public for hire. No.

(Yes or No)

If answer is "No," state for whom applicant (or predecessor in interest) transported since January 1, 1940, or prior thereto, under special contracts or agreements:

Name	Address (Street, City and State)	Written or Verbal Contract or Agreement and Date Thereof
------	--	--

See Exhibit "G"

(1)	_____
(2)	_____
(3)	_____
(4)	_____
(5)	_____
(6)	_____

Commodity Covered

Volume Agreed to
be Transported

Duration of Contract
or Agreement

See Exhibit "G".

- (1a) _____
 (2a) _____
 (3a) _____
 (4a) _____
 (5a) _____
 (6a) _____

(NOTE: Lines (1a), (2a), (3a), etc. are a continuation respectively of the same contract referred to on lines (1), (2), (3), etc.)

BWC 2e

[fol. 80]

- C. Applicant (or predecessor in interest) has continued to operate as above stated without any change in the transportation service as described above and is now so operating. Yes

(Yes or No)

If answer is "No," state in detail character and extent of such change in service.

- D. If the changes indicated in the answer to (C) above represent interruptions of transportation service since January 1, 1940, caused by conditions over which applicant (or predecessor in interest) had no control, give facts and reasons clearly and in detail.

- E. Applicant (or predecessor in interest) is engaged in furnishing seasonal transportation only. No If the answer is

(Yes or No)

"Yes," state the limits of the seasonal operation, naming month of commencement and month of cessation.

If the above seasonal period does not include January 1, 1940, was applicant (or predecessor in interest) rendering above service during the seasonal period ending prior to that date?

Was applicant (or predecessor in interest) providing same service during seasonal period subsequent to January 1, 1940? Outline fully any changes in

(Yes or No)

character and extent of service between seasonal operation including, or prior to, January 1, 1940, and subsequent seasonal operation:

Not applicable

II. DESCRIPTION OF ROUTES:

A. Regular Routes:

Ports or points to or from which applicant (or predecessor in interest) regularly operated as of January 1, 1940, or prior thereto, and number of revenue calls at each between January 1, 1940, and date of application:

— Not applicable

B. Irregular Routes:

Ports or points to or from which applicant (or predecessor in interest) offered occasional but irregular service as of January 1, 1940, or prior thereto; and number of revenue

[fol. 81]

calls at each between January 1, 1940, and date of application:

See Exhibit "G," page 3

- C. Has applicant (or predecessor in interest) acquired by purchase or otherwise a route or routes since January 1, 1940? No

(Yes or No)

If so, attach statement, properly designated, giving, for each such route, the information requested in A and B above, also name and address of predecessor. Attach copy of purchase agreement, or other documents, evidencing the acquisition of each such route or routes.

- D. Does applicant apply for rights over any route or routes operated by others under agreement? No If so,

(Yes or No)

attach statement, properly designated, giving, for each route, the information requested in A and B above, also name and address of operator. Attach copy of charter, operating contract, or other agreement.

- E. Does applicant apply for rights over any route or routes over which it operates ships owned by others under charter, contract, or other agreement? No If so, attach state-

(Yes or No)

ment, properly designated, giving, for each such route, the information requested in A and B above, also name and

address of the other party to such charter, contract, or agreement. Attach copy of such charter, contract, or agreement.

- F. Has applicant (or predecessor in interest) abandoned or disposed of by sale or otherwise any route or routes since January 1, 1940? No If so, attach statement, properly

(Yes or No)

designated, giving, for each such route, the information requested in A and B above, the manner and date of disposition, and name and address of successor, if any. Attach copy of the sales agreement or other documents evidencing such disposal.

- G. Were operations on any of the above routes or parts of such routes covered by answer to questions C, D, E, or F seasonal?

No If so, attach statement, properly designated, giving

(Yes or No)

facts clearly and in detail, showing applicant's customary operation (or that of predecessor in interest), including months of normal operating season.

- H. If applicant (or predecessor in interest) is subject to Part III of the Interstate Commerce Act in transportation of passengers or property in interstate or foreign commerce only by reason of participation in through routes and joint rates, name carriers with whom such traffic was interchanged as of January 1, 1940, or prior thereto, and interchange points: Not applicable

BWC 2g

[fol. 82]

State clearly any changes since January 1, 1940:

No change

III. DESCRIPTION OF EQUIPMENT:

- A. Total number of vessels in commission and operated by applicant (or predecessor in interest) as a common or contract carrier on January 1, 1940, including vessels owned, chartered, or leased from others. 28

(1) Number of owned vessels operated by applicant (or predecessor in interest) 3 towboats, 25 barges.

(2) Number of vessels under charter to applicant (or predecessor in interest) None

(Answers to (1) and (2) should total answer to (A).)

- B. Number of vessels owned by applicant (or predecessor in interest) and under charter to others on January 1, 1940. 1 towboat

C. Total number of vessels in commission and operated by applicant (or predecessor in interest) as a common or contract carrier on date of this application, including vessels owned, chartered, or leased from others 27

(1) Number of owned vessels operated by applicant (or predecessor in interest) 2 towboats, 25 barges.

(2) Number of vessels under charter to applicant (or predecessor in interest) None

(Answers to (1) and (2) should total answer to (C).)

D. Number of vessels owned by applicant (or predecessor in interest) and under charter to others on date of this application. 1 towboat

IV. DUAL OPERATIONS:

A. Is applicant (or predecessor in interest) controlled by a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No If answer is "Yes,"

(Yes or No)

state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit.

Not applicable

Was applicant (or predecessor in interest) so controlled on January 1, 1940? No

(Yes or No)

B. Does applicant (or predecessor in interest) control a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No If answer is "Yes,"

[fol. 83] (Yes or No)

state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit. Not applicable

Did applicant (or predecessor in interest) control such person on January 1, 1940? No

(Yes or No)

C. Is applicant (or predecessor in interest) under common control with a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No If answer is

(Yes or No)

"Yes," state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit. Not applicable

Was applicant (or predecessor in interest) under such common control on January 1, 1940? No

(Yes or No)

V. EVIDENCE OF OPERATION:

A. Applicant submits the following evidence as proof of its operations (or those of predecessor in interest) as of January 1, 1940: With the exception of one towboat under charter January 1, 1940, and some barges engaged in exempt transportation of rip-rap stone, the equipment was layed up temporarily on that date. Such suspensions of business are not unusual with a free-lance or "tramp" water carrier. See Exhibit "G."

(Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents which it believes sufficiently prove the maintenance of service as stated.)

B. Applicant submits the following evidence as proof of its operations (or those of predecessor in interest) on the date of this application: With the exception of one towboat under charter and some barges engaged in exempt transportation of rip-rap stone, the equipment is temporarily idle now, this situation being not unusual in our operations.

SEE Exhibit "G".

(Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents which it believes sufficiently prove the maintenance of service as stated.)

SEE Exhibit "H"

BWC 2i

[fol. 84]

EXHIBIT "C"

Officers and Directors of the Barrett Line, Inc.

Directors: O. Slack Barrett, 1121 Chamber of Commerce Bldg., Cincinnati, Ohio; D. B. Lyle, 2303 Grandview Avenue, Cincinnati, Ohio; Harry Vorbroker, 5229 Rose St., Norwood, Ohio.

Officers: President, O. Slack Barrett; Vice President, D. B. Lyle; Secretary-Treasurer, Harry Vorbroker.

[fol. 85]

EXHIBIT "D"

That part of our operations is exempt which consists of transportation of commodities in bulk when the cargo space of the vessel (two or more vessels while navigated as a unit shall be considered to be a single vessel) in which such commodities are transported is being used for the carrying of not more than three such commodities, as provided in Section 303 (b) of Part III of The Interstate Commerce Act. Also all intrastate carriage which is exempt pursuant to Section 303 (k) of Part III of the Act.

[fol. 86]

EXHIBIT "E"

Name	Address	City
Fred W. Alcott		Paducah, Ky.
American Barge Line	437 No. Preston St.	Louisville, Ky.
Blaske Lines	Foot of Ridge St.	Alton, Ills.
Campbell Transportation Co.	3113 Grant Bldg.	Pittsburgh, Pa.
Central Barge Line	2700 Board of Trade Bldg.	Chicago, Ills.
Ehrbacher Brothers	231 No. Main St.	Cape Girardeau, Mo.
John I. Hay Co.	332 So. Michigan Ave.	Chicago, Ills.
Walter G. Hougland & Sons		Owensboro, Ky.
Igert, Inc.	320 No. 7th St.	Paducah, Ky.
Inland Waterways Corporation	Boatmens Bank Bldg.	St. Louis, Mo.
Marquette Cement Mfg. Co.	140 So. Dearborn	Chicago, Ills.
Mississippi Valley Barge Line Company	Laclede Gas Building	St. Louis, Mo.
Ohio Barge Line, Inc.	Frick Bldg.	Pittsburgh, Pa.
The Ohio River Company	Atlas Bank Bldg.	Cincinnati, O.
Patton-Tully Transportation Co.		Memphis, Tenn.
P & S Towing Company	Shell Building	Houston, Texas.
Roberts Towing Company	431 So. Third St.	Paducah, Ky.
Union Barge Line Corp.	400 Dravo Bldg.	Pittsburgh, Pa.
Warner and Tumble Barge Line	154 S. Calhoun St.	Memphis, Tenn.
Waterways Transportation, Inc.	Railway Exchange Bldg.	St. Louis, Mo.
West Kentucky Coal Company		Paducah, Ky.

(Here follow 2 photolithographs, side folios 87-88)

Name	Address	City
Fred W. Alcott		Paducah, Ky.
American Barge Line	437 No. Preston St.	Louisville, Ky.
Blaske Lines	Foot of Ridge St.	Alton, Ills.
Campbell Transportation Co.	3113 Grant Bldg.	Pittsburgh, Pa.
Central Barge Line	2700 Board of Trade Bldg.	Chicago, Ills.
Marlbacher Brothers	231 No. Main	Cape Girardeau, Mo.
John I. Hay Co.	332 So. Michigan Ave.	Chicago, Ills.
Walter G. Hougland & Sons		Owensboro, Ky.
Igert, Inc.	320 No. 7th St.	Paducah, Ky.
Inland Waterways Corporation	Boatmens Bank Bldg.	St. Louis, Mo.
Marquette Mfg. Co.	140 So. Dearborn	Chicago, Ills.
Mississippi Valley Barge Line Company	Laclede Gas Building	St. Louis, Mo.
Ohio Barge Line, Inc.	Frick Bldg.	Pittsburgh, Pa.
The Ohio River Company	706 Atlas Bank Bldg.	Cincinnati, O.
Patton-Tully Transportation Co.		Memphis, Tenn.
P & S Towing Company	Shell Building	Houston, Texas.
Roberts Towing Company	431 So. Third St.	Paducah, Ky.
Union Barge Line Corporation	400 Dravo Bldg.	Pittsburgh, Pa.
Warner and Tumble Barge Line	154 S. Calhoun St.	Memphis, Tenn.
Waterways Transportation, Inc.	Railway Exchange Bldg.	St. Louis, Mo.
West Kentucky Coal Company		Paducah, Ky.

Receipt is hereby acknowledged of the payment of one cent
per item on mail of The Barrett Line, Inc., addressed and
mailed to each of the above addresses.

C. J. BOCKLET, Postmaster

Postmaster, Cincinnati, Ohio

The Governor, State of Alabama, Montgomery, Alabama. ✓
 The Governor, State of Arkansas, Little Rock, Arkansas. ✓
 The Governor, State of Illinois, Springfield, Illinois. ✓
 The Governor, State of Indiana, Indianapolis, Indiana. ✓
 The Governor, State of Iowa, Des Moines, Iowa. ✓
 The Governor, State of Kentucky, Frankfort, Kentucky. ✓
 The Governor, State of Louisiana, Baton Rouge, Louisiana. ✓
 The Governor, State of Minnesota, St. Paul, Minn. ✓
 The Governor, State of Mississippi, Jackson, Miss. ✓
 The Governor, State of Missouri, Jefferson City, Mo. ✓
 The Governor, State of Ohio, Columbus, Ohio. ✓
 The Governor, State of Pennsylvania, Harrisburg, Pa. ✓
 The Governor, State of Tennessee, Nashville, Tennessee. ✓
 The Governor, State of West Virginia, Charleston, W. Va. ✓
 The Governor, State of Wisconsin, Madison, Wisconsin. ✓

Receipt is hereby acknowledged of payment of One Cent
 per item on mail of The Barrett Line, Inc. addressed
 and mailed to each of the addresses listed above.

C. J. BOCKLET, Postmaster
 Postmaster, Cincinnati, Ohio.





[fol. 89]

EXHIBIT "F"

The Barrett Line, Inc. transports commodities generally, except Livestock, Currency, Bullion, Perishables, High Explosives, except small arms ammunition; Commodities exceeding ordinary equipment and loading facilities; Commodities expressly prohibited by law; Commodities that are contaminating to other lading.

[fol. 90]

EXHIBIT "G"

Statement of the History, Type, and Scope of Operations and Services of The Barrett Line, Inc.

The Barrett Line, Inc. is the result of water carrier operations participated in by four generations of the Barrett family. Those members of the family living in the last twenty years had no definite knowledge of the time and manner of the beginning of the enterprise. The probabilities are that Davis K. Barrett (1810-1887) started operations and was later assisted by his son, John Barrett (1840-1898). It is not known as to just when John Barrett became the dominant factor in their business, but some time in the seventies his son, Oscar F. Barrett (1860-1935) became active with him, and in the Eighties their business was done under the name "John Barrett & Son". This name continued to be used for years after the passing of John Barrett, during which time Oscar F. Barrett was the sole owner and operator of the line, and was so used even after O. Slack Barrett (son of Captain Oscar F. Barrett) became active in the business in 1914. In the meanwhile, the business had picked up a nickname, Barrett Line, and when the business was incorporated in 1926 it was under the name, The Barrett Line, Inc.

[fol. 91] For many years Cincinnati, Ohio, has been, and is today, the headquarters of the Line and the port of registration of the vessels of The Barrett Line, Inc. and its predecessors. On the other hand, Cairo, Illinois, has been the situs of the fleet and the port from which operations were conducted, this being a conveniently located point from which boats and barges could operate in almost any direction.

The nature of the business was that of freighting, towing, and chartering, under special contracts negotiated with the shippers, and covered the navigable rivers and tributaries of the Mississippi River system. There was a great deal of pioneering included in these operations, opening up new trades and developing them until they outgrew the equipment of the Barfett family.

One of the pioneering trades which did not outgrow the equipment was the movement of riprap stone from points on the Mississippi River between St. Louis, Missouri, and Thebes, Illinois, on the one hand to points on the Mississippi River between Number Seventy-six, Missouri, and The Passes at the Mouth of the Mississippi River; also movements from points on the Ohio River between Evansville, Indiana, and Paducah, Kentucky, and from points on the Cumberland River between Vicksburg, Kentucky, and Smithland, Kentucky; on the one hand to points between Evansville, Indiana, on the Ohio River, and The Passes at the Mouth of the Mississippi River on the other hand. This trade has persisted to the present and has been carried on in connection with other business. [fol. 92] After the turn of the century, the business acquired some quarries, and, when the enterprises were incorporated, the quarries were set up in a separate corporation under the name "The Barrett Line Quarries, Inc." The quarry corporation, however, is small and of comparative insignificance in relation to the investment in The Barrett Line, Inc., which continues to be the main enterprise.

In the main, contracts have been verbal or consisted of negotiations conducted by way of letters between the Line and its customers, comparatively few of the agreements having been put into formal form in a single instrument. In recent years the following commodities have been the principle ones handled: scrap iron, pig iron, fabricated steel, pipe, steel pilings, sulphur, stone, petroleum products, and salvage work. There has also been some business of chartering equipment to "private carriers" and also operating charter and towing for both "private carriers" and "carriers by water" as defined in the Act.

This type of work was engaged in for years prior to January 1, 1941, and has been the business of the Line since that date:

In further reference to the history of the operations of The Barrett Line, Inc., in brief, the operations over the years past and in line with the present setup covered special contract movements embracing territories and waters of the Ohio River and the Mississippi River and their tributaries. Tributaries of these main rivers have been navigated by Barrett Line boats embracing the upper reaches of the Ohio, such as the Allegheny and Monongahela, with movements of steel rails, structural steel, wire, nails, cotton-ties, and pipe, from Nonessen, Pennsylvania, [fol. 93] and Wheeling, West Virginia, and intermediate points to as far south as New Orleans and way-points, and to St. Paul, Minnesota and way points.

Navigation embraced also the Kanawha River points with movements of coal and powder to Mississippi River points including New Orleans, Louisiana; the Big Sandy River from which logs were floated and barged to Levanna, Ohio; salt from the Pomeroy Bend district to Cincinnati, Ohio, Paducah, Kentucky, and way points; paving brick from Portsmouth, Ohio, to Cincinnati, Ohio, New Orleans, and intermediate points; scrap iron and pig iron; navigation into the mouth of Licking River; operations of coal and grain on the Kentucky River to head of navigation and way points and on the Wabash River; operations on the Tennessee between Muscle Shoals and Paducah and way points; and Cumberland River between Nashville, Tenn. and Smithland, Kentucky, and intermediate points; the Upper Mississippi including the Missouri to Kansas City and the Illinois Rivers to Peoria, Illinois; the Lower Mississippi River and its tributaries such as the O'bion River; Forked-Deer River; Hatchie River; Wolf River; St. Francis River and tributaries; Arkansas River; Yazoo River and Black River; Red River and Atchafalaya as far out as the mouth of the Mississippi River, the South and South West Passes.

Commodities handled by The Barrett Line and its predecessors embrace a wide variety of those materials which may be subjected to weather without damage, all having been moved by contract for the particular movement. The Barrett Line is thus not only a "grandfather" in river transportation but might be considered the "great grandfather" of river operators.

[fol. 94] We were one of the pioneers in barging logs from origins between Baton Rouge, Louisiana, Grand

Tower, Illinois, and intermediate points on the one hand to St. Louis, Missouri, Memphis, Tennessee, Portsmouth, Ohio, and intermediate points. We pioneered the movement of petroleum products for the Standard Oil of Kentucky and for the Standard Oil of Louisiana from Wood River, Illinois and Baton Rouge, Louisiana, to Louisville, Kentucky. The latter company is now using a boat and a number of barges we sold to it when its original fleet was being expanded to meet growing needs of expanding trade. In 1918 we moved the first automobiles and trucks that were transported on the rivers by barge from Pittsburgh, Cincinnati, and Evansville, to Memphis, New Orleans, and intermediate points. We pioneered the movement of steel products, such as pipe, out of Pittsburgh area for southern Mississippi River points. A boat we sold the Carnegie Steel Company was the first one of their presently large fleet. A boat and barges we sold to Atlas Cement Company years ago started the movement of cement by barge. We assisted in the inauguration of the movement of bauxite. Thus we have demonstrated the feasibility of trades and routes by river for commodities and have assisted in providing equipment after the demonstration was successful.

Business of this kind has always been sporadic and continues so today.

[fols. 95-105] Even with our modern fleet of steel boats and barges it is readily apparent that so wide a territory could not have been covered since January, 1940, particularly in an irregularly operating business, because river movements are slow and extensive movements require long periods of time.

In general, our business has been that of contract movement of freight, chartering and towing.

This is the type of service we wish to be permitted to carry on in the future.

Exhibit "H" (Schedule I. C. C. No. 1). Omitted. Printed side page, 229 post.

[fol. 106]

Filed May 22, 1942
WC 353

APPLICATION

for

☐ CERTIFICATE AS COMMON CARRIER BY WATER
COVERING A NEW OPERATION☐ REVISED CERTIFICATE TO COVER CHANGE
IN OPERATION☒ PERMIT AS CONTRACT CARRIER BY WATER
COVERING A NEW OPERATION☐ REVISED PERMIT TO COVER CHANGE IN
OPERATIONSUBJECT TO THE INTERSTATE COMMERCE ACT
(Before answering, read General Instructions attached to
application)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of The Barrett Line, Inc.

(Name)

(Trade name)

a corporation of the State of Ohio(Status as individual, partnership, association, corporation,
fiduciary, etc. If a corporation, name the State of incorporation.
If a partnership, give names and addresses of all partners. If an
association or corporation, attach a list of names and addresses
of directors and officers.)1421 Chamber of Commerce Bldg.CincinnatiOhio

(Street address)

(City)

(State)

Application below is for the appropriate authority to:
(check applicable status)☒ institute a new operation)☐ make changes in an exist-)
ing operation covered by)
a certificate (No. WC)

or permit (No. WC)

when such changes are not)
permitted by such certifi-)
cate or permit.)☐ Common)

carrier)

☐ passengers

as a) of

☒ Contract)

carrier)

☒ property

by water in interstate or foreign commerce.

Application for certificate covering a ☐ new
common carrier of property covers ☐ revised operation as☐ all commodities☐ commodities with exceptions as detailed in Exhibits "A" or "B"

[fol. 107]

Application for permit covering a

☒ new☐ revised operation as contract carrier of property covers☒ all commodities, with exceptions, detailed in Exhibits "A" or "B".☐ specific commodities, as detailed in Exhibits "A" or "B".

Application covers

☐ regular routes☒ irregular routes

(Lists of ports served regularly and occasionally should be detailed in Exhibits "A" or "B".)

The operation is

☒ year around☐ seasonal between _____ and _____

(month)

(month)

In support of this application, applicant submits the following exhibit, attached hereto and made a part hereof:

☒ Exhibit "A"

(to be filled out by all applicants for common carrier certificates or contract carrier permits covering proposed new operations)

☐ Exhibit "B"

(to be filled out by applicants seeking revision of previously granted common carrier certificates or contract carrier permits)

Applicant will furnish such additional information to substantiate the applicant's prayer as the Commission may require.

Applicant has complied with the order of the Commission relative to the service of notice on interested parties, as shown below:

Applicant reserves the right to claim exemption from any and all provisions of Part III of the Interstate Commerce Act, the filing of this application not being deemed a waiver thereof, and the operations, if any, which applicant believes to be exempt are those described below:

[fol. 108]

(If exemption is claimed in respect of any operations, applicant should here describe such operations, and in each instance make reference to the statutory provision or provisions under which the exemption is claimed.)

See Exhibit "C"

WHEREFORE, The applicant herein prays: That the Commission issue a Permit to operate as a Contract

(Certificate) (Permit)

Carrier of Property generally

(Common Carrier) (Contract Carrier) (Passengers) (Property

with the exceptions set forth in exhibit "D"

generally, or with exceptions, or specific commodities only, as

detailed in Exhibits "A" or "B")

prays that if the facts herein contained show that applicant, although

applying for a Permit, is entitled to a

(Certificate) (Permit)

Certificate

(Permit) (Certificate), this application be considered one for the appropriate form of authority.

Dated this 20th day of May, 1942.

The Barrett Line, Inc.

(Applicant)

(Signed) O. Slack Barrett (Title) President

OATH

State of OHIO)

) ss:

County of HAMILTON)

O. Slack Barrett makes oath and says that he is the President

(Name of affiant) (Title of affiant)

of the Barrett Line, Inc.; that he is authorized on the part of said

(Name of applicant)

applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached hereto and made a part

hereof; that he has carefully examined all of the statements contained in such application and the exhibits attached thereto and

made a part thereof; that he has knowledge of the matters set forth

therein, and that all such statements made and matters set forth

therein are true and correct to the best of his knowledge, information

and belief.

(Signed) O. Slack Barrett

[fol. 109]

Subscribed and sworn to before me, a Notary Public in and for the State and County above named, this 15th day of May, 1942.

(SEAL)

Clara M. Vorbroker

My commission expires April 26, 1944.

CERTIFICATE OF SERVICE

A copy of this application has been served by receipted mail on the Governors of the following States:

Alabama	Iowa	Mississippi	Tennessee
Arkansas	Kentucky	Missouri	West Virginia
Illinois	Louisiana	Ohio	Wisconsin
Indiana	Minnesota	Pennsylvania	

A notice of the filing of this application (Form B- W. C. 5) has been served by receipted mail on the following known water-line competitors:

See Exhibit "E" 3

Postal receipts or certificates of mailing covering the above are attached hereto.

Date May 20, 1942.

Signed The Barrett Line, Inc.

(Signed) O. Slack Barrett, President.

BWC 3e

[fol. 110]

EXHIBIT "A"

(This exhibit to be filled out by all applicants for common carrier certificates or contract carrier permits covering proposed new operations)

The Barrett Line, Inc.

(Name of Applicant)

**DESCRIPTION OF PROPOSED TRANSPORTATION SERVICE
ROUTES, PORTS TO BE SERVED REGULARLY AND IRREGULARLY, AND OTHER PERTINENT INFORMATION**

I. DESCRIPTION OF PROPOSED TRANSPORTATION SERVICE:

A. Applicant proposes to engage in the business of transporting, in interstate or foreign commerce:

(1) ☐ Commodities generally.

(2) ☒ Commodities generally, except _____

(indicate

See Exhibit "D"

exceptions, either specifically or by their general nature)

(3) ☐ Special commodities _____

(indicate class or

class of commodities transported)

(4) ☐ Passengers.

B. Applicant proposes to transport passengers or property for the general public for hire.. No

(Yes or No)

If answer is "No" state for whom applicant proposes to transport under special contracts or agreements:

Name	Address (Street, City and State)	Written or Verbal Contract or Agreement
------	-------------------------------------	--

See Exhibit "F"

- (1) _____
 (2) _____
 (3) _____
 (4) _____
 (5) _____
 (6) _____

BWC 3f

[fol. 111]

Commodity to be transported	Volume to be transported	Duration of Proposed Contract or Agreement
--------------------------------	-----------------------------	---

See Exhibit "F"

- (1a) _____
 (2a) _____
 (3a) _____
 (4a) _____
 (5a) _____
 (6a) _____

(Note—Lines (1a), (2a), (3a), etc., are a continuation respectively of same contract referred to in lines (1), (2), (3), etc.)

C. Applicant proposes to furnish seasonal transportation only.
 No _____ If the answer is "Yes," state the limits of

(Yes or No)

the seasonal operation, naming month of commencement and
 month of cessation.

II. DESCRIPTION OF PROPOSED ROUTES:

A. Regular routes: Ports or points to or from which applicant
 proposes to operate regularly, and proposed number of revenue
 calls per

(Week,	Month,	Year)
--------	--------	-------

_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

B. Irregular routes: Ports or points to or from which applicant
 proposes to offer occasional but irregular service, and estimated
 number of proposed revenue calls at each per See Exhibit "F"

(Week, Month, Year)

The Mississippi River between Minneapolis and The Passes and
 intermediate points, the Ohio River between Pittsburgh and Cairo
 and intermediate points, the Illinois River between Peoria and
 Grafton and intermediate points, and all points on the tributaries
 of the above rivers.

BWC 3g

[fol. 112]

- C. Does applicant propose to acquire by purchase or otherwise a route or routes, the operation over which is covered by the provisos in section 309 (a) or 309 (f) of the Interstate Commerce Act? No Has application for certificate or permit

(Yes or No)

under such provisos been filed with the Commission?

(Yes or No)

If answer is "Yes," state name and address of previous applicant.

Name

Address

(City, Street, State)

- D. Does applicant propose to acquire, by purchase or otherwise, a route or routes operation over which was in effect on February 1, 1941? No

(Yes or No)

If answer is "Yes," has an application for a certificate or permit been filed with the Commission? State name and

(Yes or No)

address of person from whom the route or routes are proposed to be acquired?

Name

Address

(City, Street, State)

- E. If applicant would become subject to Part III of the Interstate Commerce Act in transportation of passengers or property in interstate or foreign commerce only by reason of participation in through routes and joint rates; name carriers with whom such traffic is proposed to be interchanged and interchange points:

Name of Carrier

Interchange point or points

Not applicable

III. DESCRIPTION OF EQUIPMENT:

- A. Total number of vessels acquired or to be acquired by purchase or charter and to be operated over proposed route:

(1) 23, now owned, purchased or to be purchased by applicant
by applicant

(2) Number of vessels chartered or to be chartered to applicant

(Answers to (1) and (2) should total answer to A)

BWC 3h

[fol. 113]

- B. If any of the vessels to be acquired by purchase or otherwise presently being operated over the route or routes are not to be continued in operation over the route or routes covered by this application, state facts fully:

IV. DUAL OPERATIONS:

- A. Is applicant controlled by a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water?

No If answer is "Yes," state name and address of such (Yes or No)

person, and whether such person is applying for a common carrier certificate or a contract carrier permit.

- B. Does applicant control a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No

(Yes or No)

If answer is "Yes," state name and address of such person, and whether such person is applying for a common carrier certificate or a contract carrier permit.

- C. Is applicant under common control with a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No If answer is "Yes," state name and

(Yes or No)

address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit.

[fol. 114]

V. EVIDENCE OF QUALIFICATIONS:

A. Applicant for common carrier certificate submits the following evidence as proof that it is fit, willing, and able properly to perform the service proposed, and to conform to the provisions of Part III of the Interstate Commerce Act, and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authority is sought, is or will be required by the present or future public convenience and necessity.

(Applicant should list the documents it is attaching hereto which it believes sufficiently prove that the proposed service will meet the requirements above. The documents must include the following:

- (1) A statement of assets and liabilities, or if a newly organized corporation a statement of proposed capitalization and method of financing.
- (2) If applicant has been in operation an income statement and profit and loss statement for the period of its operation; in the event the operation is such as to come under the Interstate Commerce Act, as amended, only in part, give a segregated profit and loss statement for such operation coming within the provisions of the Act, indicating the method of segregation.
- (3) A statement containing brief description of the experience of the principal officers and operating personnel.
- (4) An estimate of the available traffic and applicant's expected handling by classes of commodities or by number of passengers, and the prospective revenue and income from all traffic which applicant expects to handle.
- (5) A statement of whether applicant's operation will be for the benefit of particular industries.
- (6) A list of the known water carrier competitors now giving service between the ports which applicant proposes to serve.)

[fol. 115]

B. Applicant for contract carrier permit submits the following evidence that it is fit, willing, and able properly to perform the service proposed and to conform to the provisions of Part III of the Interstate Commerce Act, and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in the Act.

(Applicant should list the documents it is attaching hereto which it believes sufficiently prove that the proposed service will meet the requirements above. The documents must include the following:

- (1) A statement of the assets and liabilities, or if a newly organized corporation a statement of proposed capitalization and method of financing.

See Exhibit "G"

- (2) If applicant has been in operation an income statement and profit and loss statement for the period of its operation; in the event the operation is such as to come under the Interstate Commerce Act, as amended, only in part, give a segregated profit and loss statement for such operation coming within the provisions of the Act, indicating the method of segregation.

See Exhibit "H"

- (3) A statement containing brief description of the experience of the principal officers and operating personnel.

See Exhibit "I"

- (4) An estimate of the available traffic and applicant's expected handling by classes of commodities or by number of passengers, and the prospective revenue and income from all traffic which applicant expects to handle.

- (5) A statement of whether applicant's operation will be for the benefit of particular industries.

- (6) A list of the known water carrier competitors now giving service between the ports which applicant proposes to serve.)

See Exhibit "J"

[fol. 116]

EXHIBIT "C"

Exemption is claimed for transportation of commodities in bulk when the cargo space of the vessel (two or more vessels while navigated as a unit shall be considered to be a single vessel) in which such commodities are transported is being used for the carrying of not more than three such commodities, as provided in Section 303 (b) of Part III of the Interstate Commerce Act; also all intrastate carriage exempted by Section 303 (k); also transportation of liquid cargoes in bulk by certificated tank vessels exempted by Section 303 (d); and towage of floating objects exempted by Commission order, Ex Parte No. 147, pursuant to Section 303 (e) of the Act.

[fol. 117]

EXHIBIT "D"

Exceptions to commodities generally are as follows:

Livestock; Currency, Bullion, Perishables, High explosives, except small arms ammunition; Whiskey, spirits, wines and beer, except when shipped in bulk; Commodities which are contaminating to other lading; Commodities exceeding ordinary equipment and loading facilities; Commodities expressly prohibited by law.

[fol. 118]

EXHIBIT "F"

The Barrett Line, Inc., proposes to serve individual shippers under carefully negotiated written contracts covering particular movements. Some, but by no means all, have made sworn statements in connection with the application of The Barrett Line, Inc., under Section 309 (f) of the Act.

Proposed transportation would be covered by contracts having time duration necessary to complete movement of the commodities and shipper would be bound to provide the freight in stipulated minimum volume.

It is also proposed to provide either vessels or transportation to the shippers under especially negotiated contracts of charter.

The proposed business of The Barrett Line, Inc., would cover all the waters, points and ports of the Mississippi and Ohio Rivers and their tributaries, the area covered under any particular contract being determined by the needs

of the individual shipper at the time. The commodities handled under such contracts would be those for which the particular shipper needed transportation at the time covered by the contract.

The service which applicant seeks authority to render is altogether similar to that which applicant has rendered for more than fifty years, as set forth in its pending application on Form BWC-2 for permit pursuant to the terms of Section 309 (f), and the territory sought to be served is likewise identical.

[fol. 119]

EXHIBIT "G"

ASSETS and LIABILITIES

December 31, 1941

Cash and Accounts Receivable.....	\$ 43,700.00	
U. S. Bonds.....	\$256,700.00	
Stocks.....	\$ 8,100.00	
		\$308,500.00
Investment in floating equipment.....		\$631,300.00
Assets.....		\$939,800.00
Liabilities.....		
Accounts Payable.....	\$ 5,150.00	
Reserved for Depreciation.....	\$370,000.00	
Capital Stock and Surplus.....	\$564,650.00	
Liabilities.....	\$939,800.00	

[fol. 120]

EXHIBIT "H"

The Barrett Line, Inc.
1121 Chamber of Commerce Bldg.
Cincinnati, Ohio

INCOME and PROFIT and LOSS statement
also

ASSETS and LIABILITIES Statement
for five years including year 1937 to 1941, incl.

Income.....		\$1,045,500.00
Operating Expenses.....	\$786,500.00	
Depreciation Reserved.....	\$175,000.00	
		\$ 961,500.00
Net Profit 5 years.....		\$ 84,000.00

[fol. 121]

EXHIBIT "I"

The principal officers and operating personnel of The Barrett Line, Inc. have had the following experience:

O. Slack Barrett, President, has had license as Master and Pilot for over twenty years. Took charge of vessel operations in 1915. Has been General Manager for some ten or fifteen years.

Harry Vorbroker, Secretary-Treasurer, has discharged these duties for the Corporation and its predecessors since 1905.

Capt. Cassius Woods, in charge of operations, has served the Corporation and its predecessors about twenty years.

Captain Elisha Woods, on leave of absence, will have been with the Corporation and its predecessors fifty-five years in June, 1942.

[fol. 122]

EXHIBITS "E" and "J"

Name	Address	City	State
Fred W. Abbott		Paducah, Ky.	
American Barge Line	437 No. Preston St.	Louisville, Ky.	
Blaske Lines	Foot of Ridge St.	Alton, Ills.	
Campbell Transportation Co.	3113 Grant Bldg.	Pittsburgh, Pa.	
Central Barge Line	2700 Board of Trade Bldg.	Chicago, Ills.	
Ehrbacher Brothers	231 No. Main St.	Cape Girardeau, Mo.	
Inland Waterways Corporation	Boatmens Bank Bldg.	St. Louis, Mo.	
John I. Hay Co.	332 So. Michigan Ave.	Chicago, Ills.	
Walter G. Hougland & Sons		Owensboro, Ky.	
Igert, Inc.	320 No. 7th St.	Paducah, Ky.	
Marquette Cement Mfg. Co.	140 So. Dearborn	Chicago, Ills.	
Mississippi Valley Barge Line Company	Laclede Gas Bldg.	St. Louis, Mo.	
Ohio Barge Line, Inc.	Frick Bldg.	Pittsburgh, Pa.	
The Ohio River Co.	706 Atlas Bank Bldg.	Cincinnati, O.	
Patton-Tully Transportation Co.		Memphis, Tenn.	
P & S Towing Company	Shell Bldg.	Houston, Texas	
Roberts Towing Co.	431 So. Third St.	Paducah, Ky.	
Union Barge Line Corp.	400 Dravo Bldg.	Pittsburgh, Pa.	
Warner and Tumble Barge Line	154 So. Calhoun St.	Memphis, Tenn.	
Waterways Transportation, Inc.	Railway Exchange Bldg.	St. Louis, Mo.	
West Kentucky Coal Company		Paducah, Ky.	

(Here follow 2 photolithographs, side folios 123, 124-125)

Exhibits "Z" and "J"

Name	Address	City	State
Fred W. Alcott		Paducah	Ky.
American Barge Line	437 No. Preston St.	Louisville	Ky.
Blaske Lines	Ft. of Ridge St.	Alton	Ills
Campbell Transportation Co.	#3113 Grant Bldg.,	Pittsburgh,	Pa.
Central Barge Line	2700 Board of Trade Bldg.	Chicago,	Ills.
Khrbach Brothers	231 No. Main	Cape Girardeau	Mo.
Inland Waterways Corp.	Boatmens Bank Bldg.	St. Louis	Mo.
John I. Hay Co.	332 So. Michigan Ave.	Chicago	Ills
Igert, Inc.	320 No. 7th St.	Paducah	Ky
Marquette Cement Mfg. Co.	140 So. Dearborn	Chicago	Ills
Mississippi Valley Barge Line	Laclede Gas Bldg	St. Louis	Mo.
Ohio Barge Line, Inc.	Frick Bldg.	Pittsburgh	Pa.
The Ohio River Co.	706 Atlas Bank Bldg.	Cincinnati	O.
Patton-Tully Transportation Co.		Memphis	Tenn-
P & S Towing Company	Shell Building	Houston	Texas
Roberts Towing Company	431 So. Third St.	Paducah	Ky.
Union Barge Line Corporation	400 Dravo Bldg.	Pittsburgh	Pa.
Warner & Tumble Barge Line	154 S. Calhoun St.	Memphis	Tenn
Walter G. Hougland & Sons	Owensboro	Kentucky	
Waterways Transportation, Inc.	Railway Exchange Bldg.	St. Louis,	Mo.
West Kentucky Coal Company		Paducah	Ky.

Receipt is hereby acknowledged of payment of One Cent per item on mail of The Barrett Line, Inc. addressed and mailed to each of the addresses listed above.

Per Glenn J. Troffer, Asst. Postmaster
Postmaster, Cincinnati, Ohio.

The Governor,	State of Alabama,	Montgomery,	Ala.
The Governor,	State of Arkansas,	Little Rock,	Ark.
The Governor,	State of Illinois,	Springfield,	Ills.
The Governor,	State of Indiana,	Indianapolis,	Ind.
The Governor,	State of Iowa,	Des Moines,	Iowa.
The Governor,	State of Kentucky,	Frankfort,	Ky.
The Governor,	State of Louisiana,	Baton Rouge,	La.
The Governor,	State of Minnesota,	St. Paul,	Minn.
The Governor,	State of Mississippi,	Jackson,	Miss.
The Governor,	State of Missouri,	Jefferson City,	Mo.
The Governor,	State of Ohio,	Columbus,	Ohio.
The Governor,	State of Pennsylvania,	Harrisburg,	Pa.
The Governor,	State of Tennessee,	Nashville,	Tenn.
The Governor,	State of West Virginia,	Charleston,	W. Va.
The Governor,	State of Wisconsin,	Madison,	Wisc.

Receipt is hereby acknowledged of payment of One Cent per item on mail of The Barrett Line, Inc. addressed and mailed to each of the addresses listed above.

for L. H. J. F. J. Postmaster
Postmaster, Cincinnati, Ohio.



[fol. 126] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. W-353

In the Matter of the Barrett Line, Inc. Contract Carrier Applications. (Applications under Sections 309 (f) and (g) of the Interstate Commerce Act for a permit to continue operations not existing on January 1, 1940, or, in the alternative, to institute new operations in the transportation of commodities generally between all ports and points on the Mississippi and Ohio Rivers and Tributary Waterways.)

September 1, 1942, 9:30 A. M.,
Gibson Hotel, Cincinnati, Ohio.

Met, pursuant to notice, at 9:30 o'clock a. m.
Before G. H. Mattingly, Examiner.

APPEARANCES:

Robert E. Quirk, Investment Building, Washington, D. C., appearing for the Barrett Line, Inc. Applicant.

Jack B. Josselson, Atlas Bank Building, Cincinnati, Ohio, appearing for the Ohio River Company, Protestant.

Harry C. Ames, 238 Transportation Building, Washington, D. C., appearing for the Mississippi Valley Barge Line Company and the Campbell Transportation Company, Protestants.

Morris C. Pearson, 1017 Olive Street, St. Louis, appearing for the Mississippi Valley Barge Line Company.

W. G. Oliphant, 611 Gravier Street, New Orleans, La., appearing for the Federal Barge Lines, operated by the Inland Waterways Corporation, Protestant.

Stuart B. Bradley, 135 South La Salle Street, Chicago, Ill., [fols. 127-128] appearing for the Illinois River Carriers Association, Protestant.

Charles Donley, Dravo Building, Pittsburgh, Pennsylvania, appearing for the Union Barge Line Corporation.

[fol. 129]

PROCEEDINGS

Examiner Mattingly: Gentlemen, The Interstate Commerce Commission has set for hearing at this time and place Docket No. W-353, application of the Barrett Line, Inc. Please announce your appearances, the applicant first.

Mr. Quirk: Robert E. Quirk, Investment Building, Washington, D. C., appearing for the applicant.

Mr. Josselson: Jack B. Josselson, Atlas Bank Building, Cincinnati, Ohio, for the Ohio River Company, a protestant. Mr. Examiner, at this time I would like to beg leave to enter the appearance of Mr. R. A. Ellison, Neave Building, Cincinnati, Ohio, on behalf of the Ohio River Company inasmuch as I am substituting for him here today since he is in attendance in an I. C. C. hearing at Cleveland which was set prior to date this hearing was set and I would like to have his name on record to receive the notices and orders in the case.

Examiner Mattingly: The record will show what you have to say. If he is not present, he is not appearing in this particular hearing. Are there any other appearances?

Mr. Donley: Charles Donley, Dravo Building, Pittsburgh, Pennsylvania, appearing for the Union Barge Line Corporation. I am appearing for the protection of our interests as they may appear in the case.

Mr. Ames: Harry C. Ames, 238 Transportation Building, Washington, D. C. appearing for the Mississippi Valley Barge Line Company and the Campbell Transportation [fol. 130] Company as our interest may appear, and as the applicant's claims may present themselves.

Mr. Oliphant: W. G. Oliphant, 611 Gravier Street, New Orleans, La., appearing for the Federal Barge Line, operated by the Inland Waterways Corporation for and when our interests may appear.

Mr. Bradley: Stuart B. Bradley, 135 South La Salle Street, Chicago, Illinois, appearing for the Illinois River Carriers Association, Protestants in respect to the route claimed north of St. Louis on the Upper Mississippi and Illinois Rivers.

Examiner Mattingly: Are there any further appearances? (No response.) This is an application by the Barrett Line, Inc. for a contract carrier permit under the grandfather provisions of the Act covering all commodities on the Mississippi River and all its tributaries. The application includes an alternate prayer for common carrier certificate in case the applicant is found to be a common carrier as there was an additional or supplemental application file for the same rights as a new operation. As I understand it, that application was filed to cover any part of the original ap-

plication that was found not to be subject to the grandfather provisions of the Act. Is that a correct statement?

Mr. Quirk: That is right, and it was also filed more or less as a result of some correspondence or conferences with the representatives of the Interstate Commerce Commission, [fol. 131] and you might say, out of an abundance of caution.

Examiner Mattingly: Are there any preliminary remarks that anyone has to make before we proceed? (No response). You may call your first witness.

O. SLACK BARRETT WAS SWORN AND TESTIFIED AS FOLLOWS:

Direct examination.

By Mr. Quirk:

Q. Will you state your name and business address?

A. O. Slack Barrett, 1121 Chamber of Commerce Building, Cincinnati, Ohio.

Q. State your connection with the applicant.

A. I am President of the Barrett Line Inc.

Q. And how long have you been President of that company?

A. I have been President of the company since 1939.

Q. Were you connected with the applicant before that time and if so, in what capacity?

A. I took charge of our operating office at Cairo, Illinois July 15, 1915 and I have been in charge of operations ever since.

Q. Now, as the Examiner has pointed out, two applications have been filed. Will you please briefly describe the scope and purpose of the so-called grandfather application on Form BMC 2.

Examiner Mattingly: That is BWC, is it not?

[fol. 132] The Witness: Yes, BWC.

Examiner Mattingly: Water instead of motor?

Q. BWC 2.

A. As I understand it, the grandfather application BWC 2 is our application to continue operations as we have traditionally operated over the waters of the Mississippi and Ohio River systems including their tributaries and serving

particular customers as contract carriers in handling the freight they had to offer.

Q. When was that application filed with the Commission?

A. Their receipt is dated May 18, 1941.

Q. Now, is the applicant what you would describe as a regular operator or irregular operator?

A. It is an irregular operation. Our operations fluctuate very widely, both as to volume of operation and territory covered, etc.

Q. The applicant is a corporation, is it not?

A. Yes, sir.

Q. It was incorporated when?

A. In 1926.

Q. And in what state?

A. Ohio.

Q. And it has been operating over these rivers between the ports you have mentioned since that time?

A. Oh yes.

[fol. 133] Q. Now, how long has the applicant and the predecessors of the applicant operated over these rivers?

A. Well, the applicant is a successor of sole ownership of Oscar F. Barrett, and has succeeded a partnership operation of John Barrett and son, and that operation succeeded the sole ownership operation of John Barrett, and that operation succeeded the operation conducted by John Barrett and his father, Davis Kelly Barrett. I do not know when it started, but the rumor is, some time around one hundred years ago.

Q. Are you related to these Barretts you have mentioned? Is Oscar F. Barrett your father?

A. I am the son of Oscar F. Barrett.

Q. And the grandson—

A. The grandson of John Barrett and the great grandson of Davis Kelly Barrett. In other words, I am the fourth generation.

Q. What does BWC 3 seek?

A. That is an application form for a new operation. I never did think it applied to us, but it was, more or less, suggested by the Bureau of Water Carriers. We filed it as a matter of an abundance of caution and after consulting counsel, we concluded to file it. It seeks rights to operate as an irregular contract carrier over the waters of the

Mississippi River and Ohio River systems and their tributaries.

Q. Mr. Barrett, please describe the character and scope of [fol. 134] the service of the applicant.

A. Well, Mr. Examiner, we are rather a peculiar type of operators. We do freighting business on our own barges. We do a towing business on other people's barges. We do a chartering business that contemplates handling both freight, and the supplying of equipment, to people doing the chartering, and contemplates also towing on a per diem basis. Now we have never thought of ourselves as serving ports. We practice the policy of serving customers, customers that could satisfy us that the transportation they wanted would gear in with our traditional way of handling business. Now that means that we enter into contracts with them which take into consideration a great number of factors including the seasons of the year, the course of the river over which the transportation is to be effected, the time of unloading, the time of loading, and in fact, all factors that enter into the situation and whether they can supply the freight as fast as our equipment would move it. All these special factors enter into our contract. That means that we have tried to gear our operations into the necessities of commerce and industry. With that kind of a set-up, your operations are going to fluctuate widely. We have done a lot of pioneering. As a matter of fact, we pioneered the handling of steel pipes out of Pittsburgh and other steel. We did that when the railroads were embargoed from handling pipe.

Q. What year was that?

[fol. 135] A. That was 1920, the summer of 1920.

Q. Is that the year the Interstate Commerce Commission issued a great many service orders especially relative to the use of open-top equipment for coal?

A. I do not know how many service orders the Commission issued, but I understood there were a number of them, and we were frankly told, at the time the negotiations for this pipe were being carried on, that there was an order that made it impossible to ship this pipe to the oil fields at that time.

Q. From and to what points did that pipe move?

A. Pittsburgh to New Orleans. What we did then is more or less an illustration of the way we have done business traditionally. This was the situation that needed atten-

tion. It was a matter of necessity that these oil fields down south be served with this pipe and we simply converted enough of our outfits to that service to take care of the situation.

Q. In other words, you were confronted with a special situation, and you met it in a special way?

A. That is exactly it.

Q. How long did you continue to handle that pipe?

A. Oh, I think we were engaged in it for about four or five months, and maybe a little longer. That is back in 1920. We have done a lot of pioneering.

Q. Name some other commodity that you pioneered the movement by water.

[fol. 136] A. We had no idea we would handle any powder and yet, back in the 20's we had a frantic request to move powder from Nitro, West Virginia and Old Hickory, Tennessee to shipside at New Orleans and we supplied the equipment. We moved the powder down there. The two operations took us about two or three months, maybe four, but we got the commodity moved. We pioneered the movement of cement for the Atlas Cement Company. As a matter of fact, we pioneered the movement of petroleum for the Standard Oil Company back in the days before they had steel barges.

Q. Did you move it then, in barrels?

A. No. They put what they called in those days "depot tanks" on the top of barges.

Q. Did you pioneer the movement of any other commodities, automobiles, for example?

A. Yes, we pioneered the movement of automobiles, and we moved several hundred automobiles from Pittsburgh and Cincinnati to Evansville, Memphis, New Orleans and intermediate points. We were in that trade for a number of months. We pioneered the movement of bauxite ore for the Aluminum Ore Company.

Q. Where did that bauxite ore move from?

A. From De Valls Bluff on the White River, to East St. Louis.

Q. Where is White River?

A. It is down in Arkansas. We took the paving brick [fol. 137] down to New Orleans that were used in the paving of the streets down there, the first movement of paving brick that had gone down in that territory. We took several hundred thousand, several million paving

bricks down there. As far as I know, we pioneered the movement of the riprap stone used to pave the banks of the Mississippi River.

Q. Now, with respect to the movement of these various commodities that you pioneered as to water transportation, did those commodities continue to move more or less regularly by your line or was it a special movement and then it ceased?

A. Well, take the matter of the Aluminum Ore Company, the bauxite ore, we proved the movement feasible. The Aluminum Ore Company bought its own equipment and took over its own movement as a private carrier and that was carried on for a number of years. Then the railroads and the Federal Barge Line started fighting over the traffic. After we pioneered the trade for the Standard Oil Company, they built their own equipment and took over the trade and expanded it as a private carrier.

Q. Have you handled any bauxite ore in recent years?

A. No.

Q. If it were offered to you in a sufficient volume and under circumstances agreeable to your company, would you handle it now?

A. We would be delighted to.

[fol. 138] Q. I believe you described two kinds of service you had, tow boat service and the other, barge service. Just how do you describe those two services? What is the best way to describe them for the record?

A. That is rather difficult to describe them for the record because the terms that are used are so vague and overlapping, and it is hard to distinguish one service from the other because so much of the river service is called tow boat service and towing, but a strict interpretation, I suppose, of towing, would be where the carrier would furnish the boat only and tow the other man's barges and whatever happened to be on them, or even if they were empty. Barging or freighting would be carrying the freight on the barges propelled by the tow boat, the tow boat and barges being owned or controlled by the carrier. In chartering, you have wide ramifications. There is, sometimes, difficulty in determining just who is the operator, whether it is the shipper who is responsible, and therefore, the operator, or whether it is the carrier, who furnishes the equipment. You get all variations in between these two extremes in chartering.

Q. Now, what equipment did the applicant own on January 1, 1940, on or about that date?

A. We owned three tow boats, steam, stern-wheel tow boats, and twenty-five barges, I think.

Q. Did you own, also, some derrick boats?

[fol. 139] A. Yes, two derrick boats and four fuel barges called fuel flats.

Q. I suggest that you describe what you mean by a barge.

A. On the river, a barge is a vessel that is non-self-propelled and with very few exceptions un-manned and it carries the freight or cargo. The tow boat is the power unit that furnishes the motive power and pushes the barges up and down the stream.

Q. Now, as I understand it, the tow boats are used to tow freight in your own barges as well as freight in barges owned by others.

A. Yes sir.

Q. Do you tow for other carriers as well as shippers?

A. We tow for anybody, sir.

Q. Do you tow empty barges as well as loaded?

A. As well as loaded, yes sir.

Q. Are all these barges the same? Perhaps you had better describe the different kind of barges.

A. A barge may be what is called an open barge frequently called a hopper barge. That would correspond to a gondola car. Then there are dry cargo barges equipped with cargo boxes of one kind or another. They would correspond to a box car. Then there are flush-deck barges meaning the deck is flush with the top of the side. They would correspond to flat cars. Then there are tank barges that are used for liquid cargo.

[fol. 140] Q. How many tow boats does the applicant own and use now?

A. Two.

Q. What happened to the third tow boat you had in the spring of 1941?

A. The third tow boat was a little small for our service and we sold her to parties on the Warrior River.

Q. How many of those barges does the applicant own at the present time?

A. We have three that we are using in the petroleum traffic. They are documented gasoline barges. We have six under charter to the Standard Oil of Ohio for the movement of crude oil. We have six under process of charter,

two of them are in the fuel trade and four of them are ready for such service as we may have for them.

Q. Now, have these barges that are in the fuel trade been converted to tanks within the past year or two?

A. Do you mean the certificated barges or the two I mentioned, that were in the fuel trade?

Q. You mentioned altogether about nine that are in the fuel trade.

A. Well, no. There are two barges that we had in the coal trade. Let us call that coal instead of fuel.

Q. Coal?

A. Yes. Then there are three barges that are in the gasoline trade. They are handling gasoline from Louisiana to [fol. 141] the Pittsburgh area.

Examiner Mattingly: Those are tank barges?

The Witness: They are certificated tankers.

Q. They have been converted from regular barges to tankers?

A. Yes sir.

Q. Within the last year?

A. Yes sir. There is another illustration of the business we have traditionally done. Here was the situation that was perfectly apparent to us, the vital necessity of getting petroleum products up to the north and east.

Q. Now then, you have chartered six of those barges, have you not, to certain oil companies?

A. Yes sir, and they convert the barges to handle oil.

Examiner Mattingly: What does that conversion consist of? Do they build steel tanks on them?

The Witness: No sir. These barges are designed originally and built with the idea that some time during their history they will carry liquid cargoes, but when we built them, we did not install the piping and fittings, etc. So, to convert them, we install the piping and fitting and necessary equipment to make them amply safe, not only to pass the inspection, but to handle highly volatile gasoline and it is an expensive job converting them.

Q. Well, if this movement of petroleum should cease, can you re-convert these barges?

[fol. 142] A. Very quickly.

Q. Are all of your barges steel barges?

A. Yes sir.

Q. Describe the carrying capacity of these barges that are now being used to transport petroleum and petroleum products.

A. Well, the three large ones will hold about nine thousand barrels each, a barrel of forty-two gallons. The rest of the barges will hold about sixty-six hundred barrels each. Translated into tonnage, or not translating barrels into tonnage, but giving the tonnage capacity of these barges, the large one has a tonnage capacity of about fourteen hundred tons and the rest of them, about twelve hundred tons, eleven or twelve hundred tons.

Q. Do the petroleum products which are handled on these tankers move in bulk or barrels?

A. In bulk.

Q. All of it is in bulk?

A. In bulk, yes sir.

Q. State from and to what points the petroleum products are being handled.

A. One contract provides for loading to Baton Rouge or Memphis, or Louisville and for unloading at Memphis, Louisville; Boomer, West Virginia, at the head waters of the Kanawha River, and Middlebourne, West Virginia. Another contract provides for loading at lower Mississippi [fol. 143] River points and unloading at upper Ohio River points.

Mr. Ames: May I inquire whether the contract the witness is talking about covers oil, or gasoline?

The Witness: The first contract is for the movement of gasoline in bulk. The other contract is for the movement of clean oil in bulk, clean oil being either high volatile gasoline all the way down to Deisel oil and furnace oil, in other words, a clear liquid.

Q. Did you state with what companies you had these contracts?

A. One contract is with the Standard Oil of New Jersey. Another contract is with the Gulf Oil Corporation, Pittsburgh, Pennsylvania, and the charter contract is with the Standard Oil Company of Ohio, with offices in Cleveland.

Q. When do these contracts expire?

A. Both the freighting contracts expire within this calendar year. The charter contract expires in June, 1943. It has a renewal clause.

Q. It appears from your testimony, Mr. Barrett, that the applicant now has about twelve barges which have not been converted to tankers. What use is being made at the present time of those barges?

A. Six of those barges are under charter contract, verbally agreed upon, but the written instrument has not yet been presented or executed. They are to be converted to petroleum carriers. That leaves six unaccounted for. Two [fol. 144] of them we are using in the coal trade, and the other four are available for such use as we put them to.

Q. Has the applicant been requested by Director Eastman or the Petroleum Coordinator, or any other government official, to convert these barges into tankers for the transportation of oil?

A. No, we have had no official request, but I have had a number of conversations with men in the office of Defense Transportation and men in the office of the Petroleum Coordinator, and have received all the encouragement in the world in the matter of converting our equipment so that the maximum amount of petroleum products could be moved to the north and east. In April we received from Mr. Edward Clemens, Director of the Division of Inland Waterways Transport of the Office of Defense Transportation, a letter with which he enclosed the original of a letter from Mr. Frank Bruno of the National Maritime Union. This letter was addressed from Memphis, Tennessee, on April 18, 1942, to Mister Donald Nelson, Chairman of the War Production Board. In the letter he drew attention to the loss of life of seamen on vessels on the run from the Gulf Coast to the North Atlantic Seaboard. Then he stated that "there is even now plenty of idle shipping facilities along the river. Some ship-owners seem to still keep the 'business as usual' attitude. This, of course, results in the holding up of transportation of materials vital [fol. 145] to aggressive war effort. For example, we have one company, the Barrett Barge Line Company, of Cairo, Illinois, who has a large fleet of barges tied to the banks in complete idleness. These could be used to transport liquid cargo involving a minimum of expense" etc. Mr. Clemens asked me what answer he could make to Mr. Nelson.

Q. Was that reference there, to the Barrett Line, the applicant here?

A. Quite evidently it was a reference to the applicant.

By Mr. Ames:

Q. Is there any other Barrett Line located at Cairo, that you know of?

The Witness: No sir.

Mr. Ames: It was described as the Barrett Barge Line of Cairo. That would not be your company except by inference, would it?

The Witness: We get mail addressed all kinds of ways, that way among others. There being no other Barrett Barge Line, operators or owners, anywhere, on the river, and therefore, none at Cairo, except us, it must be concluded he was referring to us. I answered Mr. Clemens and assured him we had no "business as usual attitude" toward the matter, and explained to Mr. Clemens the length to which we had gone to try to convert our barge capacity to the transportation of petroleum because we realized it was a national necessity of getting it moved, and I received a very encouraging letter from Mr. Clemens, offering his assistance in the matter of priorities, etc.

[fol. 146] Q. Mr. Barrett, you say you have been connected with the applicant and its predecessors since 1915. During that time, has it been usual or unusual for a substantial lapse of time between your service in connection with particular commodities or between particular ports?

A. It has been very usual. As a matter of fact, the illustrations I have cited indicate how usual it has been. I might be operating in one trade for a few months. Then, maybe for a few months we will have absolutely nothing to do. Then, for a shorter or longer period of time we will be operating in an entirely different trade.

Q. Take for example, this petroleum movement. Is that a recent movement?

A. Yes.

Q. And nevertheless, you did pioneer the movement of petroleum by barge?

A. Yes sir.

Q. How many years ago was that?

A. That was back in 1912 or 13, maybe before that.

Q. Can you think of any other commodity that you handled, for example, within the last several years, three or four or five years, that you are not handling now?

A. Well, we are not handling structural steel now. We handled that in the last four or five years. We are not han-

dling any stone now. We handled that in the last four or five years.

[fol. 147] Q. Have you prepared, Mr. Barrett, a statement which reflects the name of your customer, date of your invoice, the address of the customer, and movements of particular commerce or performance of certain services, since and including 1936?

A. Yes sir.

Mr. Quirk: This document I have just referred to, Mr. Examiner, consists of 13 pages. It is mimeographed, and we will offer it now for identification.

Examiner Mattingly: It may be identified as Exhibit No. 1 marked for identification.

(Document referred to marked for identification "Exhibit No. 1" Witness Barrett.)

Mr. Ames: May I ask counsel if it will be his purpose to put in evidence the contract under which the applicant operated on or about 1940 and continuously since, or will the testimony be limited to a general recitation of those contracts?

Mr. Quirk: Well, Mr. Ames, I think if anyone wants to inspect the originals of the contracts, that perhaps may be done. We had not intended to actually file copies of the contracts, but I think when we finish with this exhibit, if you will defer your questions, it may not perhaps be necessary. This document is marked "Exhibit No. 1."

Q. Mr. Barrett, will you take this exhibit and explain just what it shows?

A. The exhibit shows in the left-hand column the date of our invoices. The next column is the name of the customer.

Examiner Mattingly: By the date of the invoice, do you [fol. 148] mean that is the date you billed him for the service? Is that what you mean?

The Witness: Yes sir.

Examiner Mattingly: The service had been rendered prior to those dates?

The Witness: Yes, prior to those dates.

Q. Just what do you mean by invoice? Perhaps you might explain that.

A. A bill for services rendered. The next column gives the origin, the next column the destination, and the next column the commodity or the nature of the service.

Q. Has all the data shown in this exhibit been taken from your record?

A. From our original record.

Q. And is it correct?

A. Yes sir.

Q. Now take this first movement shown on Page 1 of the exhibit for the Campbell Transportation Company, located in Pittsburgh, Pennsylvania and the movement was from Columbus, Kentucky to Columbus, Kentucky and refers to a steamer being aground. What does that all mean?

A. The steamer Isthmian was aground, and the operating officials of the Campbell Transportation Company employed us to go down there and get it off the ground; and if I am not mistaken, we brought some of their barges back to Cairo for them.

[fol. 149] Q. Take the next item on there, the American Barge Line Company, which shows a movement from Cairo to St. Louis, miscellaneous cargoes. What kind of service was that?

A. That was towing service for the American Barge Line. Their barges had scrap iron, sugar, and petroleum on them. They needed assistance in the movement of their other commodities, or barges. We rendered the service.

Q. What kind of an arrangement did you have with the American Barge Line Company for this towing service?

A. That was a per diem charter arrangement.

Q. And the minimum charges for that character of service are stated in your minimum schedule of rates and charges?

A. Yes sir.

Q. Filed with the Interstate Commerce Commission?

A. Yes sir.

Q. Take the next item. The Badgett Construction Company. What is that?

A. That consisted of a movement of a quantity of stone from Rappollee Bluff up the Cumberland River to Island No. 8.

Q. Where is Island No. 8?

A. Island No. 8 is between Hickman, Kentucky and New Madrid, Missouri on the Mississippi River, the commodity being stone.

Q. In that case, did your company perform for them a towing service and furnish barges?

A. Yes sir, that was pure transportation, barging.

[fol. 150] Q. Well, what kind of service was involved in the next item from Wittenberg, Missouri to Paducah, Kentucky?

A. Some of our equipment was engaged in raising the steamer "North Star" which had been sunk at Wittenberg, Missouri, and after having raised the "North Star", we took her to Paducah, Kentucky for repairs.

Q. Now the next item refers to a movement or a service at least involving some kind of a movement between Cairo and Hickman, Kentucky.

A. That was towing, charter of three barges for the Mengel Company.

Q. Is the Mengel Company the shipper or carrier?

A. As far as I know, they are the shippers.

Q. I suppose the next item involving the movement of stone is similar to the other movement of stone that you described?

A. Yes sir.

Q. For the U. S. Engineers?

A. Yes.

Q. That is done with your own barges and with your own power?

A. Yes sir.

Q. Now take the service performed for the Mississippi Valley Barge Line, from Louisville to St. Louis and Memphis, miscellaneous cargoes, just what kind of service was that?

A. A per diem towing for the Mississippi Valley Barge Line. They needed help and we afforded it, handling their [fol. 151] cargo between Louisville and St. Louis and Memphis.

Q. By miscellaneous cargo, what do you mean? All sorts of freight?

A. Yes sir.

Q. Packaged freight as well?

A. Yes sir.

Q. You seem to have done considerable for the Mississippi Barge Line during that period.

A. That is a period of several years when we did quite a lot of work for the Mississippi Valley Barge Line.

Mr. Ames: At that point I would like to ask Counsel to advise me and the Commission for the record, whether he is making any claim that the Barrett Line was a common

carrier or contract carrier either one in relation to those cargoes. Section 303 F-2 exempts towage service by one barge line for another. I would like to know if Mr. Quirk intends to rely on the movement of these miscellaneous cargoes that Mr. Barrett has carried for the Mississippi Valley Barge Line to establish that he is a common carrier of general commodities. Those were all on bills of the Mississippi Valley Barge Line. All Mr. Barrett does is tow that barge physically for our company. And that movement is exempted under Section 303 F-2. If he is not making any claim by reason of the carriage of those cargoes, I have no objection to this going in.

Mr. Quirk: Even if I were making those claims, which [fol. 152] I am not making, that would not be grounds for objection to the exhibit. We are putting those in to show the general sweep and character of service performed by the applicant. If this law was as simple as Mr. Ames would have you believe, we could save a great deal of time by simply deciding what is and what is not exempted, but to answer Mr. Ames directly, I think it is exempt. I think these movements are exempt and we are not putting them in for making the kind of claim that Mr. Ames refers to. Frankly, the watercarrier Act is a very ambiguous piece of law in many respects, and it is not easy to determine for certain just what kind of service comes within, and what is not, within the law. Therefore, we intend to put the facts in, and let the chips fall where they will. That is the main purpose of including those movements.

Mr. Donley: I have one other point for clarification. I assumed by what Mr. Ames has said, that he had in mind all carriers that are listed here as well as the Mississippi Valley Barge Line.

Mr. Ames: Yes, I had in mind all carrier barges. I have no objection to the exhibit as an explication of applicant's activities, but the claim is for commodities generally, and I do not want the record to indicate our acceptance of proof of general commodities handled by the Mississippi Valley Barge Line.

Mr. Quirk: The fact is, that the applicant did tow boats [fol. 153] for the other carriers and the boats contained all sorts of freight. That is the fact of the matter. What it means is something else.

Examiner Mattingly: While you are still on that point, you say they contained miscellaneous cargoes. Do you

always know what is in the barge hauled for anybody else?

The Witness: No.

Mr. Ames: Do you ever know?

The Witness: Certainly we know. Are not the Manifests handed to our Masters? When we were towing for the Mississippi Valley Barge Line, operating the extension of your service from Cairo to St. Louis and back to Cairo and Cairo to Alton and back to Cairo, our boats were standing in place of your boats and we had the Manifests and were doing the work under a per diem basis.

Mr. Ames: I would like to see the invoices covering this business for the Mississippi Barge Line and the charter contract so we may know the status of those transactions. I presume you have them here?

Mr. Quirk: Do you have them here?

The Witness: No.

Mr. Ames: Can they be furnished? If you could get a recent one and say it is typical of the rest, that is all that we would want. Do you have a recent one, with our company?

The Witness: I have none of them here.

[fol. 154] Mr. Ames: Do you have them available and could you get them here?

The Witness: Yes, sir.

Mr. Ames: Will you get a typical one and testify that it is typical? I would like to see a typical charter and typical invoice.

Examiner Mattingly: Do you have them here in town, and can you get them today?

The Witness: Yes, just two squares away.

Examiner Mattingly: These miscellaneous cargoes that you haul for other carriers, does your charge depend, in any way, on what the commodity is?

The Witness: No, it is a per diem charge.

Examiner Mattingly: So it does not make any difference, so far as the charges are concerned, what is in the barges?

The Witness: No sir.

Q. Now, it will not be necessary, Mr. Barrett, to describe each and every item in this 13-page exhibit. As you are more familiar than I am, with the range of these things, I suggest you go through and pick out enough of them so that you will show the difference in the type of service you perform from time to time. At the top of page 2, for

example, you have "Damaged Barge". I suppose that was a service, of helping Neare, Gibbs, and Company.

A. That was a matter of raising a damaged barge and taking it to Paducah. The next item, dated September [fol. 155] 10th, the Badgett Construction Company, was a movement of a whole fleet of a contractor's outfit from Hickman, Kentucky to Devil's Island, Missouri. Then, dropping down to the middle of that page,—

Q. Before you do that, what generally does a contractor's outfit consist of?

A. Barges, power boats, pile drivers, sometimes gas boats, maneuver boats of one kind or another and derrick boats.

Q. You had that one movement in 1936?

A. Yes sir.

Q. Has there been any similar movement since that time, of the same character?

A. I would have to flip through these pages to see. There may have been, because we have done quite a bit of work of that kind.

Q. I see. You may get to it later.

A. Dropping down to the middle of the page, November 23, the Treadwell Construction Company, of Midland, Pennsylvania, by special arrangement with them we moved some fabricated steel up to Genoa, Wisconsin, which is in the neighborhood of St. Paul.

Q. From Cairo, Illinois?

Mr. Ames: What are spalls right above there?

The Witness: Spalls are small stones that range from dust to anything that will stay on a fork with the tines [fol. 176] from one to two inches apart, depending on the specification.

Examiner Mattingly: I notice every once in a while is an item of vessel storage. What kind of transportation is that?

The Witness: That really is not transportation, yet under the terms of the Act, it seems that the watching of vessels that may be left in your landing from time to time, is a matter of concern, and so we have listed the invoices that were for that sort of service. We do not like to do that sort of thing, but we *do* do it as a matter of accommodation to some of our friends.

Q. I do not believe that you affirmatively described just what kind of service that is. Will you please do that.

A. Well, if a boat or a carrier wants to leave a barge at Cairo, and he has no other place to leave it, and he wants to leave it in our fleet, we watch it for them at so much per day until they get back or until another boat comes for it. There is an illustration of that on the bottom of page 4, the last line, dated February 25, 1938, W. P. McGeorge, Pine Bluff, Arkansas. That was the storage of a steamboat of his that was left in our fleet for care.

Q. I noticed on the top of page 4 that in May, June and July, 1937, you handled gasoline for the Standard Oil Company from Baton Rouge to Louisville. Was that handled in tanker barges or in barrels?

[fol. 157] A. That was handled in tanker barges. As a matter of fact, what happened there, the Standard Oil of Louisiana chartered from us three of our barges and converted them to petroleum carriers and we towed them for the Standard Oil.

Examiner Mattingly: That is the top of page 4 you are talking about?

The witness: Yes.

Examiner Mattingly: Would that not be a charter operation then? I am just trying to distinguish them. Some places you mention a commodity, whereas on page 3 there is a long list of items that just says "charter". Can we distinguish in this exhibit what is a movement of a commodity by your company for somebody else and what is a towage under some charter arrangement when you do not undertake to carry any particular commodity at all.

The witness: Sometimes that is very difficult to distinguish. As a matter of fact, now, take our present contract with the Standard Oil of New Jersey or the Gulf Refining Company. At the request of those two companies, those contracts were expressed in terms of charter. But it was chartered at so much per barrel. Now, is it a charter or is it transportation? I do not know.

Mr. Donley: Whose barges were they?

The witness: They were our barges.

Mr. Donley: The Examiner has raised that question. I [fol. 158] think maybe there will be some difficulty here in

determining on the basis of your counsel's statement on how we are going to distinguish between what you are applying for and the testimony which supports it, and just the plain statement of what you have done, and I believe that is the case at point. Take, for instance, the item that you have just described. The vessel storage. There would be some question whether or not that is transportation.

Mr. Quirk: A very serious question whether it is subject to the Act.

Mr. Donley: According to some of the more recent decisions of the Commission involving these subsidiary companies, doing that type of work, the Commission has said they are not subject to the Act and therefore not entitled to be certificated. I am trying to find out what you are supporting your application with, and I think the Examiner's question is on that point.

Examiner Mattingly: I am just trying to find out what the fact is, as to whether there is a conflict in the use of terms, whether, for instance, something labeled as a movement of gasoline and something else labeled under a movement by charter, whether they are different things or whether they are the same things.

The witness: I wish I could be more specific in answering that question. I would like to remove all doubt, but as I [fol. 159] explained, quite frequently these contracts, while expressed in terms of charter, are actually, you might say, transportation contracts. Now why some of these shippers prefer to have the contracts expressed in terms of charters, I do not know.

Mr. Donley: I think Mr. Ames has raised a pertinent question on this exhibit. If it is only offered as a statement of what you have done, we shall have to draw our own conclusion.

Mr. Ames: I think that is an excellent point. Look at the last page of your exhibit and take the very last two entries. In your direct testimony you are referred to the fact that you had six barges under charter to the Standard Oil Company of Ohio and they had gone into private carriage with those barges. Am I correct?

The witness: That is exactly correct.

Mr. Ames: So you call that a charter?

The witness: Yes.

Mr. Ames: When you come to the Standard Oil of New Jersey and the Gulf Refining Company, you call that gasoline because you are moving that under an outstanding contract.

The witness: Yes sir.

Mr. Ames: And that contract is in force?

The witness: Yes.

Mr. Ames: That is the distinction between those two entries?

The Witness: If I may be permitted to say so, I think the distinction between charter and transportation is a [fol. 160] fine, legal point.

Mr. Ames: You state that the Standard Oil Company of Ohio has gone into private carriage?

The witness: You said that they had put them into private carriage. That is what I understand they have done. We chartered them to them for such use as they may make of them on the waters of the Mississippi River System. I have not checked up on it.

Mr. Ames: You are not claiming rights as a contract carrier under that arrangement with the Standard Oil of Ohio, are you?

The witness: I do not like to argue a legal question with experts, but there is a question whether we are required to have a permit to do that.

Mr. Ames: I am not asking you that. I am asking you if you are claiming rights on gasoline as a contract carrier for the Standard Oil of Ohio, carrying their gasoline in barges chartered from you.

The witness: If my understanding of the Act is correct, we are claiming we must have a permit to do that type of business.

Mr. Donley: But not for gasoline, Mr. Barrett.

Mr. Quirk: As I said, if these things were all as simple as Mr. Donley and Mr. Ames say they are, I could say I do not think we are subject to the Act at all. I think this [fol. 161] is a special service that might be outside the Act entirely. I do not think we accomplish much by asking the witness what he is claiming. The application speaks for itself.

Examiner Mattingly: All right, go ahead with the exhibit, if you have any more typical illustrations that you wish to point out.

Q. I was going to suggest, Mr. Barrett, that you turn to page 2, for example, and I notice you show several movements of stone for the U. S. Engineers. Now, on page 3, however, instead of showing stone, you have a movement which was apparently from Cairo to Cairo under charter. Just what is the distinction between the movement on page 3 and page 2 for the U. S. Engineers?

A. Those movements on page 2 for the U. S. Engineers, marked "stone" are transportation of stone on our barges with our boats. On page 3 the items of February 8 and March 1—

Q. 1937?

A. 1937, from Cairo to Cairo, under the term "charter" were for the actual charter to the Army Engineers of three boats and six barges, and a derrick boat on a per diem basis. Now, where they went, I do not have a memorandum here.

Q. When you show charter, and Cairo to Cairo, just what does that mean?

A. That means the charter began at Cairo when the equipment was made available to them and the charter ended at Cairo when they returned the equipment to us at [fol. 162] our landing.

Q. In other words, the origin and destination being shown as Cairo, is a little misleading where a charter is shown?

A. That is correct.

Q. That is merely the place where the charter began and the charter ended?

A. Yes sir.

Q. And incidentally, that is the situs of your fleet?

A. Yes sir.

Q. Where is the registration point?

A. Our vessels are registered out of Cincinnati.

Examiner Mattingly: That particular U. S. Engineer movement, you say you do not know what happened to those boats from the time they took them from you at Cairo and brought them back to you there?

The witness: I do not know. Our trip sheet would show.

Examiner Mattingly: I do not mean that you do not actually know, but it was not any concern to you as long as they gave you your per diem, you did not care where the boats went during that period?

The witness: That is correct although the boats were under our personnel, supplied at our expense.

Examiner Mattingly: But under orders of the U. S. Engineers?

The witness: Under orders of the U. S. Engineers.

Examiner Mattingly: Go ahead.

[fol. 163] Q. On page 5, you have a Jones and Laughlin Corporation item there and it shows "Furnishing steam". What does that mean?

A. It means that one of their boats came into our landing at Cairo and wanted to clean boilers and we furnished the steam to their pump and light plant so that they could clean their boilers there.

Q. Proceed.

A. Then, there is an item, there are several items there of the Union Barge Line, under per diem arrangement, transferring concrete and creosote from their barge to the railroad cars on the Big Four Incline at Cairo.

Examiner Mattingly: Are they all just shown as charter operations?

The witness: They are shown as charters. I do not see anything else that is outstanding there other than the usual routine.

Q. You have not any further comment to make on this exhibit?

A. No sir.

Mr. Quirk: I offer that in evidence, as applicant's exhibit No. 1.

Examine Mattingly: It may be received as Exhibit No. 1. (Applicant's exhibit No. 1, admitted in evidence, witness Barrett).

Mr. Josselson: I wonder if I might ask two questions pertaining to this exhibit?

Mr. Quirk: Yes.

[fol. 164] Mr. Josselson: Mr. Barrett, does this represent all the movements on your vessels during the period covered by the exhibit?

The witness: Yes, and I am glad you asked that question because, as a matter of fact, even going back to this record here, it does not accurately reflect the history of our movements.

Mr. Josselson: But it does represent all the movements?

The witness: It represents the movements that occurred during that time.

Examiner Mattingly: Does it represent all the movements? That is what he asked.

The witness: Yes.

Examiner Mattingly: All the movements during that time?

Mr. Josselson: Then, in this exhibit, wherever the customer appears to be a carrier and in the commodity column, opposite that carrier there is "Miscellaneous Cargo", does that mean that represents equipment or movement which you did for the other carrier?

The witness: That means towing for the other carrier.

Mr. Josselson: It is freight moved under the billing of the other carrier? Is that right?

The witness: Yes sir.

Examiner Mattingly: Is it in the barge of the other carrier? In other words, these instances you just referred to, did your company furnish merely the motive power to tow somebody else's barges?

[fol. 165] The witness: On the American, the Union, and the Mississippi Valley Barge Line, we furnished the motive power. It was their barges.

Examiner Mattingly: You furnish the motive power?

The witness: Yes sir.

Mr. Ames: May I ask a question for the purpose of a motion?

Examiner Mattingly: Yes, sir.

Mr. Ames: Will you turn to page 2, Mr. Barrett. Now the movement of fabricated steel and steel tiling indicated on that exhibit I take it was a movement you made with your own tow boat and own barge.

The witness: We took that with our own tow boat. I do not remember, offhand, whether it was our barge or the Treadwell Construction Company's barge.

Mr. Ames: Did you deal directly with the owner of the goods?

The witness: With Treadwell, yes.

Mr. Ames: He was the owner of the goods.

The witness: I suppose so.

Mr. Ames: Was there a special contract made for that one movement?

The witness: Yes sir, a very special contract.

Mr. Ames: Is that contract still in force?

The witness: No, it is not in force.

Mr. Ames: Then, Mr. Examiner, I move that the grand-[fol. 166] father application be dismissed on the ground that there is no jurisdictional commodity which has been handled. They were either bulk or contractors' outfits, or some thing of that character, that the Act exempts, or they were handled under charters which are not transportation, or they were handled as towing for other transportation companies. I have examined the exhibit down to page 9, I believe, which I think covers everything prior to 1940, page 8 and I take the position that the operations of this carrier are exempt and the grandfather application should be dismissed.

Examiner Mattingly: That motion will be shown of record. Mr. Quirk, do you have any comment to make at this time?

Mr. Quirk: No, I do not think it is necessary for me to make any comment about that.

Examiner Mattingly: We will have a short recess.

(And, thereupon a recess was had).

Examiner Mattingly: You may proceed.

Q. Mr. Barrett, have you had prepared a Balance-Statement sheet of the Barrett Line, Inc., as of June 30, 1942?

A. Yes sir.

Mr. Quirk: I offer for the purpose of identification at this time, a document which is a Balance-Statement as of June 30, 1942, reflecting the assets and liabilities of the applicant at that time.

(Document referred to marked for identification, "Applicant's Exhibit 2, witness Barrett").

[fol. 167] Q. Was this statement prepared by you or under your direction?

A. Yes, sir.

Q. And are the figures shown thereon taken from the books of the applicant?

A. They are.

Q. And they are correct?

A. They are.

Q. Have you any comment to make about this statement?

A. I think the statement speaks for itself.

Mr. Quirk: We offer that in evidence as applicant's exhibit No. 2.

Examiner Mattingly: Without objection, it will be received as Exhibit No. 2.

(Applicant's Exhibit No. 2 admitted in evidence, witness Barrett).

Mr. Ames: That is being considered under the BWC 3 application?

Mr. Quirk: Yes, I would imagine it would be more relevant there than in the grandfather case.

Q. Mr. Barrett, has the applicant filed a tariff called "A" Schedule Showing Minimum Rates and Charges" with the Interstate Commerce Commission?

A. It has.

Q. Is that document identified as Tariff I. C. C. No. 1?

A. Schedule I. C. C. No. 1.

Q. And has the applicant filed a Supplement No. 1 to Schedule I. C. C. No. 1?

[fol. 168] A. It has.

Q. And that Supplement is effective September 14, 1942?

A. Yes sir.

Mr. Quirk: I want to introduce the Schedule I. C. C. No. 1 as Applicant's Exhibit No. 3 and the Supplement No. 1 to that Schedule as Applicant's Exhibit No. 4.

Examiner Mattingly: They may be admitted.

(Applicant's Exhibit No. 3 and 4 admitted in evidence, witness Barrett).

Q. Mr. Barrett, while these documents more or less speak for themselves, I think perhaps it would be well for you to describe or explain Item 25 on page 9 of Exhibit No. 3 which is the Schedule.

A. That is more or less of a catch-all, because to set up a great fabric of rates and charges on a multiplicity of commodities, and to and from a great number of points on the rivers, would have been a terrifically long task. So we set up a ton-mile basis for handling commodities of any those that are set forth specifically in the schedule.

Q. In other words, you are talking about the third paragraph under Item 25 "All Commodities in Barges", are you not?

A. Yes sir.

Q. Now, was that put in the tariff in that manner to avoid publishing rates on a variety of commodities that you may or have handled?

A. Yes sir.

[fol. 169] Q. Now, do any of the other water carriers use similar expressions in their tariff?

A. Certainly, eight of them do because they participated with us in the filing of Ellison's Mileage Guide.

Q. Who are those eight?

A. I do not know their names off and.

Mr. Ames: But they are confined to those carriers named in this mileage circular to which you refer?

A. No, I would not say so, but I know those eight who participated in that filed commodity rates on a ton-mile basis because the Commission required we set up a filing that would be a measure of the distances. The Union Barge Line, in addition to those eight, in its Schedule I.C.C. No. 1, set up (if I can find it) set up page after page of barge load rates on all commodities. The Campbell Transportation Company—

Q. Before you leave this document which is the Union Barge Line Tariff, I will ask you, Mr. Barrett, if commencing on Page 16 of that tariff and running over to and including page 29, if the tariff does not state at the top of each page the following words "Barge Load Rates in Cents Per Two Thousand Pounds on All Commodities"?

A. It does.

Q. All right. What other water carriers do you have in mind that use a similar phrase in their schedule?

A. The Campbell Transportation Company, in its I.C.C. [fol. 170] No. 1, in item 337 on page 11 it says "Rate on Freight All Kinds Not Otherwise Specified". That is the heading. Then the legend "On Barge load shipments of freight, all kinds, other than in bulk, not otherwise prohibited herein, for which rates are not otherwise provided herein, the rate shall be \$1.00 per net ton higher than the per ton rate published herein on manufactured iron and steel articles as shown on pages 21 to 29 inclusive". Those are just some of the schedules, two of the schedules that we happen to have in our file. How many others do that, I do not know.

Q. Do know whether the Mississippi Valley Barge Line and the American Barge Line use similar phrases in their tariff?

A. I do not know because I do not have their tariff before me.

Q. I have in my hands here a document which is headed "I.C.C. No. 1 Lists of Distances between Port Landings and Ports Located on Inland Waterways published effective July 24, 1942 by R. A. Ellison, agent, filed with the Interstate Commerce Commission." I will ask you whether on page 2 of that tariff there is not included the water carriers that participate in the tariff.

A. There are.

Q. Will you name them?

A. In the order in which they appear here, the Barrett Line, Inc., Cincinnati, Ohio; Brookbank, Ray, an individual, Higginsport, Kentucky; Central Barge Co., Chicago, Ill.; [fol. 171] Central States Towing and Barge Co., Inc., Kansas City, Kansas; Childs, George N., an individual, Kirkwood, Missouri; the Commercial Barge Line, Inc., Evansville, Indiana; The Greene Line Steamers, Inc., Cincinnati, Ohio; The Ohio River Company, Cincinnati, Ohio; O. F. Shearer and Sons, and then the names of the sons. Do you want me to put them all in?

Q. No.

A. Cincinnati, Ohio; the Raymond City Coal and Transportation Company, Cincinnati, Ohio. That is all.

Q. Have you any further comment to make on that item? I believe you have explained it.

A. No further comment.

Q. Unless you have a further statement to make, I have no further questions at this time.

A. Well, I might say, Mr. Examiner, it seems to me that; to understand our situation; you would almost have to understand our history for a number of years back. There is not any regime or any five years of our history that I know of, that would accurately reflect the type of business we do. It would not show the ramification of territory and commodities that we have handled. It would not show the special nature of our type of business. We have simply got to have broad authority both as to rivers and commodities if we are going to continue our traditional type of business. I do not believe that Congress intended to put

a company out of business that has been operating for approximately one hundred years and certainly the long years of successful operation prove that there is some necessity for that type of operation. We have, in our opinion, served the public. Not that the last five years are typical of our business, but we had an average income, gross income, of about \$200,000.00. We had an average net income of a little under \$17,000.00. Now, a company that is not serving the public does not have that kind of a history. The mere fact that the National Emergency happens to show up a desperate need for petroleum products moved in a given direction, certainly should not count against us if we convert our equipment temporarily to handle that kind of products while the emergency exists. In other words, that petroleum might just as well have been something else and if it had been, let us say, pig iron, because the Commission has definitely agreed that pig iron comes under the regulation of the Act, if it had been pig iron instead of petroleum that they wanted to move from lower Mississippi River points to the north and east, we would have gone into that business. But under the Act, unless we have a permit to handle a wide variety of commodities and pig iron had not been in there, we could not have stepped in. We have considered ourselves as standing in the place of the old common law private carrier. That means we have to have available to us a wide variety of territory and a wide variety of commodities if we are going to exist as carriers on the river.

[fol. 173] Mr. Quirk: Mr. Examiner, Exhibit D attached to the grandfather application, sets out certain exemptions. Of course, we do not have to renew that claim here, I do not suppose. It runs with the record.

Examiner Mattingly: It is customary to make the application a part of the record in the proceedings. That is your desire in this instance?

Mr. Quirk: Yes, I move the applications be made a part of the record, both of them.

Examiner Mattingly: Are there any objections. (No response). They will be considered as part of the record.

Mr. Donley: Before you leave the exhibit, I would like to be furnished copies of Exhibits No. 3 and 4 at the convenience of the applicant.

Examiner Mattingly: Will you furnish Mr. Donley copies of the tariff?

Mr. Quirk: I have one copy here. I will give you that.

Mr. Donley: My request has been granted.

Mr. Bradley: May I have a copy, also?

Examiner Mattingly: You do not have to do it right now.

Mr. Quirk: You may cross examine.

Cross-examination.

By Mr. Ames:

Q. This emergency you speak of, on petroleum is an emergency which has arisen since this country entered the war? Is that the emergency you are talking about? That [fol. 174] is the one that has caused you to go into the petroleum hauling business?

A. Well, was it? Was it not an emergency that created the pioneering of the pipe movement out of Pittsburgh?

Q. I am asking you the question,

A. Yes.

Q. That is the answer. Please just answer my questions. The commodity item you refer to in your tariff, item No. 25, are you publishing that as holding yourselves out to the general public to transport all commodities in barges if and when offered to you for transportation?

A. We definitely do not hold ourselves out to the general public for that.

Q. The carriers you refer to as having similar clauses in their tariff are all common carriers, are they not?

A. They are not.

Q. Are they not certificated as common carriers?

A. They are not.

Q. The Union is, is it not?

A. The Union Barge Line is a certificated common carrier.

Q. And Campbell has filed an application for a certificate as a common carrier, has he not?

A. I do not know.

Q. Tell me what the heading means on item 25 "Minimum Rate for Towing Service"? What do you mean by towing service?

[fol. 175]. A. It means transportation of commodities on river equipment.

Q. That is not the kind of towing you do for the Mississippi Valley Barge Line and the American Barge Line, is it?

A. That is the broad term towing.

Q. Now the transportation you perform under those rates, is that what is known as "free on" and "free off" service?

A. Line haul service.

Q. That is to say, the shipper loads the barge, and the consignee unloads it?

A. Yes sir.

Q. And you perform the intermediate towing?

A. Yes.

Q. And your minimum weight in connection with all that transportation, is five hundred tons?

A. Yes sir.

Q. Item 30, Mr. Barrett, you have "Charters, or Rental of Vessels" and then you have "Kind of Vessel" and "Tow boats, viz.: 500 horse-power or less, rate per hour \$10.00." Is that the kind of rate you assess against the Mississippi Valley Barge Line when you tow for them or when you rent them a tow boat?

A. Yes.

Q. That is the rate?

A. Yes sir.

Q. And those were the rates, I take it, or their equivalent [fol. 176] lent which were used in the movement depicted in your Exhibit No. 1 where opposite the Mississippi Valley Barge Line you show "Miscellaneous Cargo"?

A. Yes.

Q. When you charter those tow boats to the Mississippi Valley Barge Line, do they have your crew on there?

A. Yes sir.

Mr. Quirk: You understand, of course, that these rates are minimum rates?

Mr. Ames: That is all right either way. I am not particularly concerned about that.

Q. When the rental or charter becomes effective, the Mississippi Valley Barge Line takes the boat and runs the boat with your crew?

A. Yes sir.

Q. But the crew is subject to their orders?

A. Not exactly.

Q. While they are running the boat, do you say the crew is not subject to their orders?

A. No.

Q. You are going to bring this charter around, are you not, after recess?

A. Yes.

Q. If there happens to be a cargo on those barges that your boats are towing, if it consists of a carload of canned [fol. 177] corn, for example, do you have to contract with the owners of that canned corn?

A. No. There is no responsibility to the owner.

Q. Your only contractual relation is with the Mississippi Valley Barge Line?

A. Yes sir.

Q. Now, Mr. Barrett, I show you a letter dated June 20. —I will show it to your counsel in a second—written on stationery of the Barrett Line, Inc. Is that your signature? (Handing letter to the witness.)

A. Yes sir.

Q. Now, do you mind if I ask you some questions about that or do you prefer to treat that as a confidential matter?

A. I did not read the letter. I do not know what it is from memory. (Witness reads letter.)

Q. Do you mind if I ask you about that?

A. Go ahead.

Q. In that letter to Mr. Pierson, who is the Traffic Manager of the Mississippi Valley Barge Line, you state this "As a matter of fact, we have always operated somewhat as permit operators and have handled a wide variety of commodities. There are many general types we have never handled and toward which we have no aspiration. Most of these are high-grade and usually are shipped in limited quantities. From our point of view, it appears it would be much easier to set forth a list of exceptions rather than [fol. 178] to list those to be covered by the permit." Now, could you describe for me those commodities you referred to, that you have never handled and towards which you have no aspirations? What would they be?

A. I would say furniture.

Q. Furniture?

A. As a matter of fact, I asked in that letter and suggested to your company that they draw up a list for me of the commodities on which they would like for us to waive, and nothing ever happened.

Q. I am trying to develop them now.

A. It could have been done prior to the hearing, at much more convenience to both companies.

Q. While that is a point that may be one hundred percent right,—I do not know—it has not been done, and I am trying to do it now. Would you exempt package freight?

A. Package freight is a term that is very broad and very general and may include a lot of things that I do not know whether would be included or not. In other words, the movement we made from Nitro, West Virginia and Old Hickory, Tennessee to Shipperside at New Orleans, is that or is it not package freight? It was done up in boxes. I do not know. I am not familiar with the traffic terms.

Q. You have asked for authority to handle general commodities, and that is as wide as the range of commodities. [fol. 179] and then you say there are some you never handled and toward which you have no aspiration. I would like you to say a little more definitely if you can, what those commodities are. Perhaps we can withdraw our protest.

A. I am not prepared, at this time, to go into a long list of commodities and say which we have and which we have not handled, and which we want to handle and which we do not want to handle. That is a thing that would take days for consideration.

Q. Are you claiming to be a contract carrier under the grandfather clause with respect to the commodities that you never handled in the past, at all?

A. No sir.

Q. Then your claim for general commodities must be limited one way or another, must it not?

A. We have two applications here.

Q. I am talking now about the grandfather case. Are you limiting your request for grandfather rights to the commodities which you actually hauled under contract, or are you asking the Commission, under the grandfather clause, to go out in the future, and handle anything you might care to handle?

A. As a matter of fact, this whole transportation Act—I am not making a speech, I am leading up to the answer of your question—this whole transportation Act apparently [fol. 180] does not contemplate in its provision that there was any such type of operation as we had traditionally engaged in, so it is trying to make a square peg fit in a round hole. Now strictly and literally interpreted, in the

language of the statutes, we would not be allowed to have a grandfather permit on anything we did not have on our barges or in transit on January 1, 1940. Now, that apparently became a matter of importance and the Commission, as you know, has gone back first for one year and now for three years, apparently in an effort to deal fairly with the carriers on that subject. Now, if you go back one year or three years, where are you going to stop? I do not believe any five-year period of our history of one hundred years would reflect the kind of business we have traditionally done, and certainly the last five years do not reflect our business.

Q. You could answer my question without all that interpretation of the Act. I am asking you if a permit of a contract carrier under the grandfather clause is granted, what commodities, which you never handled in the past, do you expect to handle?

A. As a matter of fact, I do not know what commodities we never handled in the past. I am only the fourth generation. In the early days we handled produce boats and they contained all kinds of produce from this part of the country moving to New Orleans.

[fol. 181] Q. Have you done that continuously?

A. We have for a hundred years.

Q. Hauled produce?

A. No, we have not hauled produce for a hundred years, but we contracted for handling the commodities the shippers wanted to move over the rivers.

Q. If the Commission limited your authority to specific commodities rather than general commodities, are you satisfied with the commodities you listed in your Exhibit No. 1?

A. No, sir. I have stated over and over again that the business as reflected in Exhibit No. 1 being the business that was transacted in the five year period, namely, the last five-year period, does not reflect the kind of business we have traditionally done and I further repeatedly stated that any five-year period in our history would not give a general picture of the type of our business.

Q. You are relying on this exhibit to show the character of operation since 1936?

A. In those five years, yes.

Q. How many outstanding contracts did you have, I mean actual contracts, executory contracts, so to speak, did you have on January 1, 1940?

A. I do not know without consulting the record, but not over one or two.

Q. For hauling what commodity?
[fol. 182] A. Stone.

Q. Have you those stone contracts in effect today?

A. No. We have not hauled any stone in the last two years.

Q. How many contracts do you have outstanding now for transportation executory in character?

A. A contract with the Standard Oil of New Jersey and the Gulf Refining Corporation for transportation. We have a charter contract with the Standard Oil of Ohio where we furnish them barges. They furnish the transportation.

Q. Would you mind submitting for the record here for inspection only, a copy of your charter with the Standard Oil of Ohio?

Mr. Quirk: Why should we do that? It is bulk commodities and it is exempt from the Act.

A. I do not object to bringing it over because it is a charter contract on a barrel basis.

Q. Is that the Ohio contract that is on a barrel basis?

A. No, that is a pure charter of barges.

Q. That is not transportation you are performing?

A. No, but it is regulated under the Act. We can not charter any equipment for any purpose to a shipper unless we have a permit.

Q. You are not claiming that as transportation. You are claiming that because that comes under the Act as chartering barges to industry?

[fol. 183] A. It is all part of the permit.

Mr. Quirk: Except it happens to be oil in bulk and is exempt on that account.

Mr. Ames: I think I agree with you on that.

Q. Have you in your experience had a contract with anyone to haul general commodities? By that I do not mean a hundred different contracts with a hundred different shippers, but one contract with one shipper to haul general commodities?

A. No, not as far as I know.

Q. Are all your rates "free on" and "free off," Mr. Barrett?

A. Yes, I think so.

Q. On item 20 "Iron or Steel Articles" you name rates from Breckenridge to Indiana. Would that be "free on" and "free off" loading?

A. Yes. In that schedule they are "Free on" and "free off." The only time we ever provide loading and unloading is under a special provision of the contract and since our work is done under special contract, under special provision, there might be anything.

Q. Have you ever in your operations handled traffic in less than barge loads?

A. Yes.

Q. Is that a usual practice or is it rather unusual?

A. Unusual.

Q. You could not, at the present moment, handle anything in less than barge loads under your schedule?

[fol. 184] A. No.

Q. So, at the present time, you are limited to barge loads?

A. To 500 tons and on some, 4000.

Q. Gross tons.

A. Yes.

Q. Do you observe them as a published minimum?

A. Certainly.

Q. Are you willing to have any permit issued to you limited to barge load traffic?

A. There again you are using a term that is rather vague and indefinite. What constitutes a barge load of automobiles, for instance?

Q. Are you willing to have your permit limited to commodities handled in lots of 300 tons or more?

A. Well, let us go back to the illustration on automobiles. They would be—yes, I would say 300 tons—

Q. In other words, you are not aspiring to handle traffic in the ordinary carload unit as expressed by the railroad.

A. Definitely not.

Q. And that same thing would be true of less than carload?

A. Definitely not.

Q. Now, would you turn to your Exhibit No. 1, please. The answers you have given me about arrangements with the Mississippi Valley Barge Line under entires made in

this exhibit would apply also to entries made under the [fol. 185] American, and the Campbell, and the Union, would it not? With all those you have practically the same arrangement?

A. Except we are—let us start out in another way. No, in some cases the American Barge Line chartered some barges from us. As a matter of fact, I believe the Mississippi Valley Barge Line did, too.

Q. Well, when they charter a barge from you—

A. We bill you for it.

Q. You bill us for the charter of the barge?

A. Yes.

Q. And we perform the transportation in the barge?

A. Yes.

Q. On page 1 everything you have there illustrated under "Miscellaneous Cargoes" for the American and the Mississippi Valley Barge Line—I think that is all on that page.

Examiner Mattingly: Campbell is on that page.

Mr. Ames: That is grounding a steamer.

Examiner Mattingly: Yes.

Q. Those listed under "Miscellaneous Cargoes" are handled under the condition you described to the Examiner and to me about the rental of barges or tow boats. Is that correct?

A. As a matter of fact, if my memory is correct, at that time the business for which we billed your company, the Mississippi Valley Barge Line Company, was when we were handling your business between Cairo and St. Louis and Alton.

[fol. 186] Q. Yes, you were renting us the tow boat.

A. We were doing all your movements between St. Louis and Cairo and St. Louis and Alton just like Coyle was handling the movement from the Mississippi River to Texas points.

Q. Let us see right there. Coyle claimed to be a connecting carrier.

A. I do not know what Coyle claimed.

Q. You are making the claim that you did something like Coyle. I am stating Coyle claimed he acted as a connecting common carrier.

A. I am talking in the river language. I am not talking in traffic language. Coyle was handling the movement of the barges belonging to those companies from the Missis-

Mississippi River over to Texas points. We handled all your movements of your barges between Cairo and St. Louis and Alton and Cairo.

Q. Did you have any contract with the owner of the goods on those barges?

A. No sir. And I do not believe Coyle did either.

Q. Did you issue any bill of lading on anything on those barges?

A. No.

Q. Or did you have any contract with those owners?

A. No, and no responsibility to the owners.

Q. How did the Mississippi Valley Barge Line compensate you for what you did?

[fol. 187] A. By paying the bills on a per diem basis.

Q. Is that true of the tow you made for the American on page 1?

A. There is this difference. We were not doing any of their business. We were merely meeting their tows and interchanging them.

Q. We do not admit that you were doing any of our business. On page 2, opposite the Union Barge Line Company is "Miscellaneous Cargo". In that case, did you perform a towing service for the Union Barge? That is on page 2.

A. The next to the last item?

Q. Yes.

A. Yes, we performed a tow for the Union Barge Line.

Q. Of a loaded barge.

A. A whole tow.

Q. And in that case you had no contract relationship with the owner of the goods?

A. That is right.

Q. Would that same thing be true of the two entries on page 3, the first entry the Mississippi Valley Barge Line and down in the middle there, the Mississippi Valley Barge Line again, that same arrangement would hold there?

A. Yes, towing.

Q. What is the difference between the entry "Miscellaneous Cargoes" opposite Mississippi Valley Barge Line and "charter" opposite the American Barge Line?

[fol. 188] A. You are referring to item 3-1-1937 on the American Barge Line?

Q. No. The first and second items. You have one shown opposite the Mississippi Valley Barge Line as "Miscellaneous

ous Cargo" and opposite the American it shows "Charter". What is the difference? What made you list those differently?

A. I do not have any pencil notation on that top one. The item dated February 10, 1937 and the item dated March 1 in the middle of the page of the American Barge Line were both charters of barges.

Q. And that was service that was done right in the port of Cairo?

A. No sir. The charter of the barge; they took the barge at Cairo and returned it to us at Cairo.

Q. You chartered them the whole barge?

A. Yes, the whole barge.

Q. Now, on page 4 you have four entries there of Miscellaneous Cargo of the Mississippi Valley Barge Line. Were they all done under the same circumstances that you have recounted?

A. Yes sir.

Q. That is to say, you are not making any claim there as you did on page 2, that you served for us between St. Louis and Cairo and Alton; page 1, rather.

A. I do not know that I could answer that without going back to our record because there were several seasons when that set-up applied to the operation north of Cairo; whether [fol. 189] this referred to here on page 4 was one of them, I do not know.

Q. Well, it is pretty definite when you mention the Mississippi Valley Barge it is an exception rather than a rule that they are not between Cairo and St. Louis, but even so, I want to be sure to have the record straight that on none of those shipments did you have any contractual relation with the owner of the goods.

A. If it will save time, as far as I know, we had no contractual arrangement with the owner of the goods with the Mississippi Valley Barge Line.

Q. Would that same thing be true of the item from the Union, the American, and the Campbell?

A. Yes.

Q. All right. Now back to page 1 of that exhibit again, the only specific commodity there that you had named is stone. Was that the type of stone which is loaded in bulk?

A. Yes sir.

Q. On page 2 the only commodities you have specifically named are stone, spalls, fabricated steel and steel tiling. Are the stone and spalls loaded in bulk?

A. Yes.

Q. How about the fabricated steel and steel filing? Is that regarded other than bulk?

A. I do not know how it is regarded.

[fol. 190] Q. How do you regard it?

A. Fabricated steel, of course, would not be a bulk commodity. Steel tiling, I do not know.

Q. But you testified, in connection with them, that this contract is not in effect today.

A. It is not in effect today.

Q. On page 3 the only commodity you listed specifically there is gasoline. That is a liquid commodity in bulk.

A. Yes sir.

Q. Is that handled in the type of vessels designed for the gasoline trade?

A. It must be. They are certificated.

Q. On page 4 you have gasoline and stone. This is bulk stone?

A. Yes sir. But may I reserve this statement. You are asking me to decide whether it is going to be termed a bulk commodity by the Commission.

Q. No, I would not do that.

A. I just want to make it clear on the record that I am not saying how I believe the Commission will rule on that.

Q. That is right.

A. How they will decide the matter because I was amazed when they decided pig iron was not a bulk commodity.

Mr. Quirk: Mr. Barrett, the stone was not wrapped up in sacks or bags, was it?

The witness: No.

[fol. 191] Examiner Mattingly: This stone that you handled for the Engineers, is that in big chunks of riprap stone or is it crushed stone?

The witness: No, none is crushed stone. It depends on their specifications.

Examiner Mattingly: What was it used for?

The witness: Bank paving. Some of it ran up to, on some of their specifications, one hundred pounds. On some specifications it runs up to 150 and some I have seen of 300 pounds per piece as the top limit of weight.

Q. On page 6, is that stone there the same type as previously testified to?

A. Yes, and all the way through.

Q. All the way through. Now you testified several times about automobiles and I noticed that your exhibit No. 1 does not show any movement at all of automobiles.

A. That is correct.

Q. You are asking for the right to be a contract carrier in the future on automobiles?

A. Yes sir. We filed a Schedule of Rates.

Q. Under the grandfather clause?

A. Under the application which we have pending before the Commission we are asking for the right to handle automobiles.

Q. Although you have never handled them before?

A. Oh yes we have handled them before. We pioneered in the movement.

[fol. 192] Q. Where are they on Exhibit No. 1?

A. They are not on Exhibit No. 1. I have stated over and over again that exhibit only would give a person an erroneous idea as to the history and nature of the business of the Barrett Line, Inc.

Mr. Quirk: Instead of erroneous, do you mean inadequate?

The witness: Inadequate, yes, that is the word.

Q. It is quite apparent whether you pioneered the movement or not you have not moved any since 1936. Is that right?

A. No.

Q. Why did you not include it on your Exhibit No. 1 which I thought was all inclusive?

Mr. Quirk: You misunderstood the witness. He did not handle automobiles since 1936.

Mr. Ames: He said he did.

A. I said clearly "No sir".

Examined Mattingly: He got your question mixed up if he did. I think very clearly Exhibit No. 1 shows the total movement of this company from 1936 to date, and if it is not on there, it did not move.

Q. If you did move automobiles, when was that?

A. 1918 was when we moved the first ones.

Q. Did you ever handle any automobiles for account of the Commercial Barge Line?

A. No sir. The Commercial Barge Line was not heard [fol. 193] of at that time. Neither was the Mississippi Valley Barge Line.

Q. That is right. On your twenty-one barges that you personally own, I understood that six are already under charter to the Ohio company, and six are being prepared for charter to that company?

A. Yes sir.

Mr. Quirk: Whom does he mean by the Ohio company? The witness: The Standard Oil of Ohio.

Q. The fuel you spoke of as being hauled is all coal?

A. Coal.

Q. Describe these four which are now available for general service. What types are they?

A. They are what is known as flush-deck steel scow barges.

Q. By "flush-deck" do you mean the deck is perfectly flush like an aeroplane carrier?

A. Yes, like an aeroplane carrier.

Q. Underneath, were they originally designed for tankers for liquid commodities?

A. They were originally designed and built so that any time during their life-time they could be easily converted to liquid carriers, and they were also designed so that any time they could be converted for cargo type or box type for dry cargo.

Q. At the moment the boats are flat?

A. That is right.

[fol. 194] Q. You have no cargo box type at the present time?

A. At the present time we have not, but as I say, the barges are so designed and so built that they can have cargo boxes very readily applied on the decks. As a matter of fact, we did, when we pioneered the movement of cement, build cargo boxes right on the decks of the barges and we carried this cement in these cargo boxes where it was kept free from dirt and from the weather.

Q. What kind of billing do you issue on your traffic? Do you have some sort of bill of lading?

A. We issue no bill of lading.

Q. You bill under contract?

A. We bill under a specific contract that applies to the specific situation in hand; and the particular shipper.

Q. Does your line have any terminal facilities at all? Do you own terminal facilities for the discharge and receipt of freight?

A. No, sir. We have two derrick boats to expedite the transfer of freight.

Q. How do you get new business?

A. By looking awfully hard for it. Sometimes, however, it comes to us from unexpected sources.

Q. But you do go out after it?

A. We do not have a corps of solicitors out. As a matter of fact, we have none.

[fol. 195] Q. You yourself go out and solicit, do you not?

A. When I get time to.

Examiner Mattingly: Do you advertise?

A. Only in the Waterways Journal.

Q. You do advertise in the Waterways Journal?

A. Yes.

Q. Do you have any outstanding contracts for the movement of iron and steel articles such as are listed in item No. 10 of your Tariff?

A. May I answer that question and a whole string of questions that might follow on that same subject, that at the present time our contracts are solely with the companies I enumerated in direct testimony.

Q. Would that same answer apply as of January 1, 1940?

A. I don't exactly recall what our situation was January 1, 1940. We may have had some unexpired, one or two unexpired contracts.

Q. If you had, that would reflect itself, I take it, in Exhibit No. 1?

A. Exactly. From the billing here in 1940, the early part of 1940, it would appear that we did not have any contracts at all, January 1, 1940, unless we had some unexpired work on delivering stone.

Q. Even if you did have an unexpired contract on stone, the actual movement under the contract would show up [fol. 196] here on your Exhibit No. 1?

A. Yes.

Mr. Quirk: Mr. Barrett, I understand that the contract with the U. S. Engineers did not expire until after June 1941.

The witness: That would be correct, yes sir.

Mr. Quirk: And as there is an optional clause in it, it would not be necessarily reflected on it.

The witness: That is true.

Q. What did you ever haul for the U. S. Engineers except bulk stone?

A. We hauled cement.

Q. Where is it on Exhibit No. 1?

A. It is not on Exhibit No. 1. You said what did we ever haul.

Q. I mean from 1936 to date. I do not want to talk about ancient history. What did you ever haul for the U. S. Engineers except stone from 1936 to date?

A. Whatever we hauled from 1936 to date is in Exhibit No. 1.

Q. If there is nothing but stone there—

A. If there is nothing but stone there, we hauled nothing but stone.

By Mr. Bradley:

Q. Was the Barrett Line also engaged in the selling of stone?

A. An affiliated corporation, known as the Barrett Quarries, Inc. was.

[fol. 197] Q. Were you transporting stone that belonged to the affiliated company until delivery was made to the U. S. Engineers at destination?

A. Some times that is the case and sometimes it belonged to the government. It all depends on how the contract with the government read. If the stone was sold F.O.B. at the quarries, it belonged to the government. If the stone was sold delivered at the site of the work, it belonged to the quarries corporation. There were a number of contracts involved and over a period of time, and some of them are F.O.B. quarries, and some of them F.O.B. destination. Which was which, I could not, at the moment, tell you.

Mr. Bradley. That is all.

Redirect examination.

By Mr. Quirk:

Q. You use the word "affiliated". Does the Barrett Line, Inc. the applicant here, own any stock in this Barrett Quarries?

A. It does not. Neither do the Barrett Quarries own any stock in the Barrett Line, Inc.

Q. Then you used the wrong word when you said affiliated.

A. I mean that there is a community of ownership.

Q. In other words, some of the people owning stock in the one own stock in the other?

A. That is right.

By Examiner Mattingly:

Q. Do you have any affiliations with any other companies or transportation lines?

A. No sir.

[fol. 198] Q. It is a separate, independent company, without any connection?

A. We have no connection with any type of ownership or joint control or any other pooling arrangements with any other carrier of any kind.

Q. Do you participate in any other movement of any kind?

A. No sir.

Q. Your movements are all from point of origin to specific destination and that is the entire transportation?

A. Entire transportation; line-haul.

Q. You do not move it to your line from some other line or beyond your line by some other line?

A. No.

Q. About your method of getting business, just how do you get your business? Could you give us a little more detail about that? In other words, if anybody, a responsible individual, comes to you and wants you to do some work for him, would you do it?

A. No sir, we would not.

Q. What determines whether you take a job or not?

A. There are portions of the river over which we prefer to operate. Now, as to between two offerings we will choose the one that is to be moved over the portion of the river

• we prefer. Sometimes we do not know the applicant for service and we do not continue the matter any farther. [fol. 199] As a matter of fact, in the last two weeks we have had very active solicitation on the part of three different parties for the same service and we simply picked the party whom we would prefer to do business with.

Q. If you had a boat lying idle and somebody came in and wanted to use it in a legitimate business and it was a responsible party, would you say "No, I do not want to do business with you?"

A. No, you sit down and discuss your problem with him to see whether our outfit could be of any service to him. You find out when the movement is contemplated in reference to the season of the year and over what part of the river, how much freight can he give us, and at what rate of speed in order to produce a continuity of service, for a series of trips so that we would not have equipment lying idle waiting for a load to come to us or on the other hand, whether the consignee is able to take the freight as fast as we can bring it in. All those things are taken into consideration before we get down to negotiating the contract. In other words, every situation is a separate situation as far as we are concerned. Every job is figured on its own basis to meet the situation involved. Now, in that respect I think it illustrates that we actually stand in the place of what has been known in common law as the old type of private carrier.

Q. Do you ever make a contract for just one trip?

[fol. 200] A. That particular case that I commented on, to Genoa, Wisconsin, was one trip but it was under special circumstances.

Q. So a man does not have to furnish a continuity of movements to persuade you to haul his stuff?

A. If he has a special problem; no. If it is just one of those run-of-the-mine trips that anybody could handle, we could not figure on it if wanted to.

Recross examination.

By Mr. Donley:

Q. Do you not come in competition there with the common carrier?

A. You probably did not hear me. I said we do not bother with spot movements?

Q. Yes, I heard you. In this explanation to the Examiner as to how you selected the business that you want to handle, do you not generally come in competition with common carriers engaged in that same service?

A. I suppose so, and on that theory we sent copies of the application to all common carriers and we realized that where there are no special problems involved, where a movement can fit into the service offered by a common carrier, the common carrier by and large is going to get the business. That is the reason I have been insisting that the type of business we do is more or less a specialized, peculiar sort of thing. It is very difficult for an outsider to understand unless he has been involved.

[fol. 201] By Mr. Ames:

Q. You get the business that is good for the carrier?

A: There is that "cream of the traffic" theory.

Q. In other words, when you make up your mind to take or reject a shipment, the thing that influences you is whether or not it is good for the Barrett Company.

A. May I answer that question in this form; when it is costing the oil company three times as much to move their product by the river as it did in tankers, it is quite obvious that the Barrett Line is not getting rich on the contracts they have with the oil companies to move oil to help out in this emergency, and we have done that time and time again in our long history where we have forgotten our own interests in order to serve the customer.

By Mr. Donley:

Q. Wait a minute. Let us get back to the picking and choosing.

A. Yes sir.

Q. The line that you referred to in answering the Examiner and Mr. Ames. Is there anything you do or have done, in the way of carriage or transportation that could not be performed by the regular common carrier such as the Mississippi Valley, the Union, or the American? The Union carries all that type of freight, does it not?

A. Well, as a matter of fact, take the petroleum movement again as an illustration, all the common carriers are [fol. 202] handling petroleum, I think.

By Mr. Ames:

Q. Is not petroleum right now about all that the barge lines are handling any substantial quantity of?

A. No. I see sulphur going by my door in thousands of tons and scrap iron in hundreds of thousands of tons. There are any number of commodities being handled in great volume.

Q. How about the consumer's gas? Are they moving very much business?

A. I am not in the consumer's gas business.

Q. You were not in the petroleum business, but when the other traffic began to lag, you hauled petroleum to save your company. You did not sacrifice anything in the hauling of petroleum?

A. That is one of those questions like "why did you stop beating your wife?"

Examiner Mattingly: I do not think that is necessary.

Mr. Ames: He says he is serving the public.

Mr. Quirk: If the public does not need oil today, I do not know what they do need.

Mr. Donley: That is an argument. I am interested in following your line of questioning or Mr. Barrett's explanation of how he selects or picks and chooses the things he wants to do. I would like to develop that.

By Mr. Donley:

Q. Can you tell us, Mr. Barrett, whether the services that you perform, or rather, are potentially performing, [fol. 203] are not the same as the common carrier performs?

A. Mr. Donley, I appreciate the spirit of helpfulness that prompts the question. No, there is a great difference in that in my humble opinion. I do not believe the common carrier can gear his operation into the specific demand of the particular customer like a contract carrier can, who simply sets aside for the work of that particular customer, a portion of his plant and operates for that man to all intents and purposes, like a man owning the equipment. Now a common carrier, from my experience—I may be wrong—but from my experience I do not believe a common carrier with the multiplicity of demands upon its equipment, and with the necessity of keeping up schedules, I do not believe they can gear into the special situation like a contract carrier.

Q. Let us follow through a moment to get it nailed down in connection with your Exhibit No. 1. As I understand you, you would not be satisfied to have the Commission give you a permit based on the commodities you have already transported, shown in Exhibit No. 1. You want to step over into the general commodities group and take from that the things that you want to transport and it is obvious that those are commodities which the common carriers are transporting today and must be governed by the law of the certificate that requires them to take whatever comes, whatever is offered. Why do you step into that particular group of carriers and ask to be permitted to [fol. 204] take whatever you please out of that in competition with the common carriers?

A. For the very reason, Mr. Donley, that our experience has taught us that the need of a particular situation will present a picture that can be served better by the special service of the contract carrier rather than by the general service of the common carrier and I do not say that to the disparagement of the common carrier.

Q. And that particular situation is represented in your Exhibit No. 1?

A. No, I do not believe that our Exhibit No. 1 adequately reflects the picture of our operations. I really do not.

Q. I am not concerned about your making your case. I am wondering how far you are going to go back to prove the point I am trying to get at and I relinquish my question at that point.

By Mr. Mattingly:

Q. Mr. Donley touched on the subject of competition. The thought is, you are, to a greater or less extent, in competition with other carriers.

A. Yes, as all carriers.

Q. Rail, motor and water?

A. Yes.

Q. And you may be in competition with all of them on various traffic, various kinds?

A. Yes.

Q. Your list of equipment shown in the application, I [fol. 205] believe you changed that some as to the present day, did you not?

A. Yes sir.

Q. And I think you also referred to some other equipment such as derricks, and flat and fuel barges? Are they a part of the equipment that is listed in the application or is that in addition?

A. They were inadvertently not listed in the application. We owned them then and we own them now; two derrick boats and four small fuel barges. We call them small coal barges. We call the flats to distinguish them from the larger barges.

Q. What are those boats user for, particularly?

A. The fuel barges?

Q. And the derricks, too.

A. The derricks are used to facilitate the transfer of freight between land and water or land and barge facilities or from barge to barge.

Q. Do you make a charge for the use of those boats in loading or unloading?

A. The charges are set up in our schedule, yes sir.

Q. Now, as to exemptions, I assume that you are asking to be exempted on anything the law entitles you to an exemption?

A. Yes. As a matter of fact, however, we neglected to ask for an exemption on that I.C.C. 417 or 117 whatever it is.

Mr. Quirk: The answer is yes.

The Witness: Yes.

[fol. 206] Q. You are claiming whatever exemptions the law entitles you to, whatever they are?

A. Yes.

Q. Bulk commodities, or towing, or operations within a single ha-bor or anything else?

A. Yes. I think we can paraphrase the particular section and refer to it.

Q. And in addition to that, you list certain commodities that you do not want to handle in any event?

A. Yes sir.

Q. Or will not, such as shown on Exhibit F?

A. Yes sir.

Mr. Ames: That is Exhibit D.

Examiner Mattingly: I am looking at BWC 2 application, Exhibit F.

The witness: That was amplified in BWC 3 application.

Examiner Mattingly: Yes, D in the other one—does not correspond.

The witness: Except there are some amplifications in BWC 3.

Q. Your contracts—how long do they usually run if there is any usual characteristic?

A. Well, I am glad you asked if there is any usual characteristic. I do not know that there is. They probably average from four to six months. We did have one contract of ten years.

Q. Is that still in operation?

A. No sir, thank God.

[fol. 207] Q. What is the shortest period that you recall you ever had a contract for?

A. Two or three days.

Q. Do you have many like that?

A. On salvage work or something like that kind, we are liable to have quite a few.

Q. I am talking about transportation.

A. No, none of them on transportation, no sir. A transportation contract is never for less than two or three months.

Examiner Mattingly: I believe that is all the questions I have except this. Of course, this supplemental BWC 3 application, that is for new operation purposes, and I just want to ask if you have made all the showing you want to make on the matter of public convenience and necessity.

Mr. Quirk: I think so.

Examiner Mattingly: All right.

By Mr. Oliphant:

Q. In your direct testimony, in regard to the pioneering, in the transportation of bauxite ore, I believe you confined that transportation between mines located in White River in Arkansas to St. Louis for the account of the Aluminum Company. Is that correct?

A. Yes sir.

Q. When did this pioneering start, if you can recall.

A. That was way back there prior—it was prior to 1915 or 16 because, in one of those two years, the Aluminum Ore [fol. 208] Company provided itself with its own fleet of three boats and a large fleet of barges and went into the

business itself and of course, when they went in, we went out, we having pioneered the movement and proved it feasible.

Q. You did not mean to infer that the so-called fight between the Federal Barge Line and the rail carriers is what put your company out of the transportation of bauxite ore, do you?

A. No, sir, I did not mean to infer that, although, as a matter of fact, we were in the negotiation picture with the Aluminum Ore Company right up to the time that that fight between the railroad and the Federal Barge Line culminated.

Q. Was not the oil-water rate of the Federal Barge Line established several years prior to the establishment of the rail rate?

A. Of course, the Federal Barge Line established its rates when it first started handling the ore, I suppose.

Q. And the rail carriers, the Missouri Pacific particularly, met that barge rate?

A. So I am told.

Re-redirect examination.

By Mr. Quirk:

Q. Now, as to these general commodities, you have been asked several times, Mr. Barrett, about what you wanted. This is a leading question but I think it is pardonable. Is not what you want authority to do what you have always done?

A. Exactly.

We do not anticipate any operation of handling all kinds [fol. 209] of mixed cargo in one job.

Q. Your family has been in the barge business for, you say, about one hundred years?

A. Yes sir.

Q. And during that time, if the circumstances were right, you would handle a great variety of commodities?

A. Yes sir.

Q. Although there are quite a number you do not handle and would not handle?

A. That is right.

Q. During that period, what has been the development of water lines on these rivers? Has it increased or decreased?

A. During that period, the water-line activity has increased very greatly. As a matter of fact, we helped a number of these water-lines to get into business including the Mississippi Valley Barge Line.

Q. With respect to this matter of how the business comes to you, is it not a fact that most of the business comes to you unsolicited?

A. Quite a bit comes unsolicited.

Q. And having been in the business a hundred years, you are fairly well known in the river trade, I take it?

A. That is right.

Q. Is it not a fact that many shippers come to you and want your service when it turns out, after you sit down with them, that you do not have the kind of service they [fol. 210] want and they were mistaken about what you could do, and things of that kind?

A. That is correct.

Q. Now, when you negotiate with some, or are in the process of negotiating with some prospective shipper, would you state generally whether it has been your experience that this prospective shipper is sure to ascertain whether you can make a better rate than some common carrier or some other common carrier by water or railroad or what has been your experience in that line? Does the competitor enter the picture at all, generally speaking?

A. As I understand your question, when we sit down and negotiate with a customer, no competitor enters into consideration. If we can do the work at a price he can afford to pay under the circumstances and conditions we impose, and then if our equipment is adequate to meet his problem, then we go ahead and negotiate the matter to see whether there can be a meeting of minds on it.

Mr. Quirk: That is all.

Examiner Mattingly: Are there any other questions of Mr. Barrett? (No response.) Witness excused.

Mr. Mattingly: Are there any other witnesses?

Mr. Quirk: That is the applicant's case. The applicant rests. We have no other witnesses. A moment ago you asked a question whether we were going to introduce any further evidence on the BWC 3 application to show public [fol. 211] convenience and necessity. Of course, that was a slip of the tongue.

Examiner Mattingly: I was going to correct that. I believe it should be worded in the public interest on these cases.

Mr. Quirk: Consistent with the public interest. We think the evidence, showing the fact that these people have operated for one hundred years, shows that the service is needed and that it would be consistent with the public interest to continue it.

Examiner Mattingly: Of course, this application is in the alternative. The Commission, in deciding the case, might not get around to the subject of public convenience and necessity after all.

Mr. Ames: So far as the Mississippi Valley Barge Company, and the Campbell Barge Line is concerned, we make no point that Mr. Barrett and his father and his grandfather before him, have been water operators. We have no desire to prevent them from doing anything that they have done in the past. Our sole point is, that their past operation is an exempt operation. On the question of, whether we have any evidence to offer, I would like to defer that until after the lunch period.

Examiner Mattingly: I was just wondering if we could wind up now and not have to come back after lunch.

[fol. 212] Mr. Ames: If we might have about fifteen minutes' recess I think we would be able to state what we are going to do.

Examiner Mattingly: Suppose we take a little recess, then.

(And, thereupon a recess was had.)

Mr. Ames: On behalf of the protestants, and I believe I am authorized to speak for all of them, we feel that there is no necessity of our introducing any evidence in the grandfather case because if the applicant is entitled to grandfather rights, he is entitled to them whatever we say. On the BMC application, we feel if Mr. Quirk is inclined to rest his case on the present record, we are willing to rest ours.

Examiner Mattingly: Do you have anything further to say, Mr. Quirk?

Mr. Quirk: No.

Examiner Mattingly: Do you desire to file briefs in this case?

Mr. Ames: I would like to, yes.

Mr. Quirk: Will there be a proposed report?

Examiner Mattingly: That is not the usual practice unless one is requested.

Mr. Quirk: I make a request that there be a proposed report.

Mr. Ames: We will join in that request. May we have sixty days on the brief?

Examiner Mattingly: If there is no objection.

[fol. 213] Mr. Quirk: We are willing.

Examiner Mattingly: There will be a proposed report and I will fix the date for the briefs October 30 for all interested parties. Let the record show that the brief date of October thirtieth is by the unanimous agreement of all the interested parties. If there is nothing further, this hearing is now closed.

(And thereupon, at 1:15 p. m. the hearing was closed).

[fol. 214]

EXHIBIT No. 1

INTRODUCTORY

The following embraces a list of

Customers,
Addresses,
Dates of Invoices,
Origin of Movement,
Destination of Movement,
Commodities handled,

for the years of 1936, 1937, 1938, 1939, 1940, 1941 to August 1942.

Territory covered in these operations embrace from the immediate vicinity of Pittsburgh, Pa. to Cairo, Ill. and way points on the *Ohio River*

Also *Cumberland River*

Also *Tennessee River*

On the *Mississippi River* it embraces as far north as Genoa, Wisc. to New Orleans, La., and way points.

THE BARRETT LINE, INC.
CHAMBER OF COMMERCE BLDG.
CINCINNATI, OHIO

THE BARRETT LINE, INC.
1121 Chamber of Commerce Bldg.,
Cincinnati, Ohio

Date of Invoice	Customer	Address	Origin	Destination	Commodity
1936					
1/7	Campbell Transp. Co.	Pittsburgh, Pa.	Columbus, Ky.	Columbus, Ky.	Str. Isthmian aground
1/20	American Barge Line Co.	Louisville, Ky.	Cairo	St. Louis	Misc. Cargoes
1/13	Badgett Construction Co.	Memphis, Tenn.	Rappolee Bluff	Island #8	Stone
1/17	Neare, Gibbs & Co.	Cincinnati, Ohio	Cumb. River	Paducah	Str. North Star
1/24	The Mengel Co.	Hickman, Ky.	Wittenberg, Mo.	Hickman	Charter
2/17	U. S. Engineers	Memphis, Tenn.	Cairo	New Madrid	Stone
2/24	do	do	Rappolee Bluff	Hickman, Ky.	Stone
3/31	Miss. Valley Barge Line	St. Louis, Mo.	Cumb. River	St. Louis-Memphis	Misc. Cargoes
4/24	U. S. Engineers	Memphis, Tenn.	Rappolee Bluff	Cairo	Stone
5/2	Miss. Valley Barge Line	St. Louis, Mo.	Cumb. River	Cairo	Misc. Cargoes
5/31	do	do	Wood River, Ill.	Cairo	do
6/22	do	do	do	Memphis	do
7/28	do	do	St. Louis	Cairo	do
7/30	American Barge Line	Louisville, Ky.	Cairo	Memphis	do
8/5	Miss. Valley Barge Line	St. Louis, Mo.	St. Louis	Cairo	do
[fol. 216]					
1936					
9/4	Neare, Gibbs & Co.	Cincinnati, Ohio	Gray's Pt. Mo.	Paducah	Damaged barge
9/10	Badgett Construction Co.	Memphis, Tenn.	Hickman, Ky.	Devils Island, Mo.	Barge fleet
9/12	U. S. Engineers	Memphis, Tenn.	Rappolee Bluff	Gayoso, Mo.	Stone
10/13	U. S. Engineers	do	Cumb. River	Various Points	
11/11	do	Memphis, Tenn.	and Weeley's, Mo.	Cairo & Memphis	Stone
			Rappolee Bluff	Island #8	Spalls
			Cumb. River	& New Madrid	

11/11	do	do	Rappolee Bluff & Neeley, Mo.	bet. Cairo and Memphis	Stone
11/23	Treadwell Construction Co.	Midland, Pa.	Cairo, Ill.	Genoa, Wisc.	Fabricated steel and steel piling
12/14	U. S. Engineers	Memphis, Tenn.	Rappolee Bluff	bet. Cairo and Memphis	Stone
12/18	Illinois Central R. R. Co.	Chicago, Ill.	Cumb. River	Gilbertsville, Ky.	Charter
12/31	American Barge Line Co.	Louisville, Ky.	do	on Tenn. River	Misc. Cargo
12/31	Union Barge Line Co.	Pittsburgh, Pa.	Bet. Memphis, Tenn.	Cairo, Ill.	
1937				Louisville, Ky.	
1/7	Union Barge Line Corp.	Pittsburgh, Pa.	between Cairo	Memphis,	Misc. Cargo
1/26	do	do	Cairo	Cairo	Vessel Storage
[fol. 217]					
1937					
1/30	Miss. Valley Barge Line	St. Louis, Mo.	Cairo	Putney Light	Misc. Cargo
2/10	American Barge Line	Louisville, Ky.	Cairo	Cairo	Charter
2/23	Big Four R. R.	Cairo, Ill.	Cairo	Cairo	Charter
2/8	U. S. Engineers	Memphis, Tenn.	Cairo	Cairo	Charter
2/8	do	do	do	do	Charter
2/8	do	do	do	do	Charter
3/1	do	do	do	do	Charter
3/1	do	do	do	do	Charter
3/1	American Barge Line	Louisville, Ky.	do	do	Charter
3/1	Standard Oil Co. of La.	Baton Rouge, La.	Baton Rouge, La.	Louisville, Ky.	Gasoline
3/1	Miss. Valley Barge Line	St. Louis, Mo.	bet. Cairo, Ill.	Alton, Ill.	Misc. Cargo
3/31	American Barge Line Co.	Louisville, Ky.	Cairo	Cairo	Charter
3/31	Standard Oil Co. of La.	Baton Rouge, La.	Baton Rouge, La.	Louisville, Ky.	Gasoline
4/8	do	do	do	do	do
4/8	American Barge Line Co.	Louisville, Ky.	Cairo	Cairo	Charter
4/30	Standard Oil Co. of La.	Baton Rouge, La.	Baton Rouge, La.	Louisville, Ky.	Gasoline
5/13	U. S. Engineers	Memphis, Tenn.	Cairo	Cairo	Charter

[fol. 218]

THE BARRETT LINE, INC.
1121 Chamber of Commerce Bldg.,
Cincinnati, Ohio

Date of Invoice	Customer	Address	Origin	Destination	Commodity
1937					
5/31	Standard Oil Co. of La.	Baton Rouge, La.	Baton Rouge, La.	Louisville, Ky.	Gasoline
6/30	do	do	do	do	do
7/13	do	do	do	do	do
9/30	Miss. Valley Barge Line	St. Louis, Mo.	bet. Cairo, Ill.	St. Louis, Mo.	Misc. Cargo
10/31	do	do	do	do	do
11/10	U. S. Engineers	Memphis, Tenn.	Rappolee Bluff Cumb. River	bet. Cairo & Memphis	Stone
11/10	do	do	do	bet. Memphis & Helena	do
11/30	Miss. Valley Barge Line	St. Louis, Mo.	bet. Cairo	St. Louis	Misc. Cargo
12/4	U. S. Engineers	Memphis, Tenn.	Rappolee Bluff on Cumb. River	Cat Island and Battle Axe, below Memphis	Stone
12/31	Miss. Valley Barge Line	St. Louis, Mo.	bet. Cairo	St. Louis	Misc. Cargo
12/31	U. S. Engineers	Memphis, Tenn.	Rappolee Bluff and on Cumb. River and Neeley's Ldg. Mo.	Cairo, Ill. Battle Axe below Memphis	Stone
1938					
1/3	Miss. Valley Barge Line	St. Louis, Mo.	Cairo	St. Louis	Misc. Cargo
2/25	W. P. McGeorge	Pine Bluff, Ark.	Cairo	Cairo	Vessel Storage
[fol. 219]					
1938					
2/28	Miss. Valley Barge Line	St. Louis, Mo.	St. Louis	Memphis	Misc. Cargo
2/28	do	do	Cairo	Louisville	do
3/14	Jones & Laughlin Corp.	Pittsburgh, Pa.	Memphis, Tenn.	St. Louis, Mo.	Furnishing steam
3/16	Miss. Valley Barge Line	St. Louis, Mo.	Cairo	Cairo	Misc. Cargo
3/31	do	do	do	St. Louis	do
4/7	Ohio River Company	Cincinnati, Ohio	Cairo	Cairo	Furnishing steam
4/30	Miss. Valley Barge Line	St. Louis, Mo.	Cairo	St. Louis	Misc. Cargo
5/23	do	do	do	do	do
9/9	Neare, Gibbs & Co.	Cincinnati, Ohio	Cairo	Cairo	Charter
9/28	Geo. J. Kausler, Ltd.	New Orleans, La.	Cairo	Cairo	Charter
10/13	U. S. Engineers	Memphis, Tenn.	Rappolee Bluff on Cumb. River	bet. Cairo & Memphis	Stone
11/9	do	do	do	do	Stone
1939					
3/31	U. S. Engineers	Memphis, Tenn.	Cairo	Cairo	Vessel Storage
1/18	Campbell Transp. Co.	Pittsburgh, Pa.	Cairo	Cairo	Furnishing steam
1/7	U. S. Engineers	Memphis, Tenn.	Rappolee Bluff on Cumb. River	Avenue, Ark.	Stone
[fol. 220]					
1939					
3/1	U. S. Engineers	Memphis, Tenn.	Cairo	Cairo	Vessel Storage
3/15	Miss. Valley Barge Line	St. Louis, Mo.	Cairo	St. Louis	Misc. Cargo
3/15	U. S. Engineers	Memphis	Neeley's Ldg. Mo.	Osceola, Ark. and Memphis	Stone
4/12	Miss. Valley Barge Line	St. Louis, Mo.	Cairo	St. Louis	Misc. Cargo
4/30	do	do	do	do	do
5/8	do	do	Island #20	St. Louis	do
5/24	American Barge Line	Louisville, Ky.	Cairo	Cairo	Charter
5/17	Union Barge Line	Pittsburgh, Pa.	Cairo	Cairo	Charter
5/25	Miss. Valley Barge Line	St. Louis, Mo.	bet. Cairo	St. Louis, Mo.	Misc. Cargo
5/31	Union Barge Line	Pittsburgh, Pa.	Cairo	Cairo	Vessel Storage
5/31	U. S. Engineers	Memphis	do	do	do
6/30	do	do	do	do	do
7/5	Carnegie Steel Co.	Pittsburgh, Pa.	Cairo	Cairo	do
7/31	U. S. Engineers	Memphis, Tenn.	do	do	do
7/31	Union Barge Line	Pittsburgh, Pa.	Cairo	Cairo	Charter
8/31	U. S. Engineers	Memphis, Tenn.	Cairo	Cairo	Vessel Storage
8/31	Hunter Steel Co.	Pittsburgh, Pa.	Cairo	Cairo	Charter

THE BARRETT LINE, INC.
1121 Chamber of Commerce Bldg.,
Cincinnati, Ohio

Date of Invoice	Customer	Address	Origin	Destination	Commodity
1939					
8/1	Nears, Gibbs & Co.	Cincinnati, Ohio	Cairo	Cairo	Charter
9/5	U. S. Engineers	Memphis, Tenn.	Rappolee Bluff on Cumb. River	Avenue, Ark.	Stone
9/20	do	do	Neeley's Ldg. Mo.	Avenue, Ark.	Stone
9/30	Hunter Steel Co.	Pittsburgh, Pa.	Cairo	Cairo	Charter
9/23	Carnegie Steel Co.	Pittsburgh, Pa.	Cairo	Cairo	Vessel Storage
10/31	Hunter Steel Co.	Pittsburgh, Pa.	Cairo	Cairo	Charter
10/23	U. S. Engineers	Memphis, Tenn.	Rappolee Bluff on Cumb. River	Cairo, Ill.	Stone
			Neeley's Ldg. Mo.	Memphis, Tenn.	
				Old Town Bend	
11/8	do	do	Rappolee Bluff on Cumb. River	Avenue, Ark.	Stone
				Old Town Bend, Ark.	
11/22	Carnegie Steel Co.	Pittsburgh, Pa.	Cairo	Cairo	Vessel Storage
11/27	Union Barge Line	Pittsburgh, Pa.	Cairo	Cairo	Charter
11/30	Hunter Steel Co.	Pittsburgh, Pa.	Cairo	Cairo	Charter
12/7	do	do	do	do	do
11/30	U. S. Engineers	Memphis, Tenn.	Rappolee Bluff and Neeley's Ldg. Mo.	Caruthersville, Mo.	Stone
				Mhoon's Ldg.	
				Old Town Bend, Ark.	
[fol. 222]					
1939					
12/15	U. S. Engineers	Memphis	Rappolee Bluff and Neeley's Ldg. Mo.	Cairo, Ill.	Stone
				Huffman, Ark.	
				Memphis, Tenn.	
				Helena, Ark.	
				Old Town Bend, Ark.	
12/27	do	do	do	Cairo, Ill.	Stone

				Gayoso, Mo.	
				Memphis, Tenn.	
1940					
1/5	American Barge Line	Louisville, Ky.	bet. Cairo, Ill.	Memphis, Tenn.	Misc. Cargo
2/14	U. S. Engineers	Memphis	Cairo	Island #8	Towing
3/7	American Barge Line	Louisville, Ky.	Cairo, Ill.	Alton, Ind.	Misc. Cargo
			Memphis, Tenn.	Cairo	
3/14	do	do	Cairo	Memphis	Misc. Cargo
4/2	do	do	Paducah, Ky.	Memphis	Misc. Cargo
4/18	do	do	Cairo, Ill.	Memphis, Tenn.	Misc. Cargo
			Memphis	Dam #18, Ohio River	
5/11	Union Barge Line	Pittsburgh, Pa.	Cairo	New Orleans, La.	Misc. Cargo
			New Orleans	Cairo	
5/3	H. H. Halliday Sand Co.	Cairo, Ill.	Cairo	Cairo	Charter
6/6	Union Barge Line	Pittsburgh, Pa.	Cairo, Ill.	Leavenworth, Ind.	Misc. Cargo
			Leavenworth, Ind.	New Orleans	
			New Orleans	Cairo	
[fol. 223]					
1940					
6/29	Union Barge Line	Pittsburgh, Pa.	Cairo	Evansville, Ind.	Misc. Cargo
			Evansville	New Orleans	
			New Orleans	Cairo	
9/1	U. S. Engineers	Memphis	Cairo to Memphis	Memphis, Cairo	Towing
1/30	Miss. Valley Barge Line	St. Louis	Cairo	Cairo	Charter
2/20	do	do	do	do	Charter
3/9	Nears, Gibbs & Co.	Cincinnati, Ohio	Cairo	Cairo	Charter
3/29	Big Four R. R.	Cairo, Ill.	do	do	Charter
4/23	Union Barge Line	Pittsburgh, Pa.	Cairo	Cairo	Charter
9/25	Central Ill. Pub. Serv. Co.	Springfield, Ill.	Rappolee Bluff on Cumb. River	Shawneetown, Ill.	Stone
8/15	Union Barge Line	Pittsburgh,	Cairo	Cairo	Charter
5/31	Ohio River Co.	Cincinnati, Ohio	Cairo	Cairo	Furnishing steam
4/22	U. S. Engineers	Memphis,	Cairo	Cairo	Vessel Storage
5/8	do	do	do	do	do
6/8	do	do	do	do	do
7/8	do	do	do	do	do

THE BARRETT LINE, INC.
1121 Chamber of Commerce Bldg.,
Cincinnati, Ohio

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Date of Invoice	Customer	Address	Origin	Destination	Commodity
8/7	do	do	do	do	do
8/12	U. S. Engineers	Memphis	Cairo	Cairo	Furnishing steam
[fol. 224]					
1940					
9/12-24	U. S. Engineers	Memphis	Cairo	Cairo	Furnishing steam
10/8-22	do	do	do	do	do
11/4-19	do	do	do	do	do
12/9	do	do	do	do	do
1/12	do	do	Rappolee Bluff on Cumb. River	Keys Pt. Tenn.	Stone
9/28	do	do	do	Cairo, Ill. and Memphis, Tenn.	Stone
10/10	do	do	do	Memphis	Stone
11/15	do	do	do	Cairo, Ill.	Stone
12/14	do	do	do	Cairo, Ill. Osceola, Ark. Memphis, Tenn.	Stone
1941					
1/31	Gulf Coast Barge Line	Houston, Texas	Vicksburg, Miss.	Grand Tower, Ill.	Gasoline
2/6	John I. Hay Co.	Chicago, Ill.	Cairo, Ill.	Alton, Ill.	Gasoline
2/8	Union Barge Line	Pittsburgh, Pa.	Cairo	Cairo	Charter
2/28	U. S. Engineers	Memphis, Tenn.	Cairo	Cairo	Vessel Storage
3/31	do	do	do	do	do
[fol. 225]					
1941					
3/31	Miss. Valley Barge Line	St. Louis, Mo.	Cairo	St. Louis	Misc. Cargo
4/11	U. S. Engineers	St. Paul, Minn.	Cairo	Cairo	Vessel Storage
4/21	Miss. Valley Barge Line	St. Louis, Mo.	Cairo	St. Louis	Misc. Cargo
5/15	do	do	St. Louis	Toney's Towhead	do
4/30	U. S. Engineers	Memphis	Cairo	Cairo	Vessel Storage

5/5	Union Barge Line	Pittsburgh, Pa.	Cairo	Cairo	Charter
5/29	Patton Tully Co.	Memphis, Tenn.	Wychiffe, Ky.	Nashville, Tenn.	Gasoline
5/29	do	do	Cairo	Cairo	Charter
5/31	U. S. Engineers	Memphis	Cairo	Cairo	Vessel Storage
6/12	do	do	Cairo	Cairo	Furnishing Steam
6/26	Jones & Laughlin Steel Co.	Pittsburgh, Pa.	Cairo	Cairo	Charter
6/30	do	do	do	do	Charter
7/14	U. S. Engineers	Memphis	Cairo	Cairo	Furnishing steam
6/30	American Barge Line	Louisville, Ky.	bet. Memphis bet. Muscatine, Iowa	Alton, Ill.	Misc. Cargo
7/31	do	do	" Keokuk, Lynxville, Wisc.	Cairo, Ill.	Misc. Cargoes
8/23	U. S. Engineers	Memphis, Tenn.	Cairo	Caseyville, Ky. Madison, Ind.	
[fol. 226]				Cairo	Furnishing Steam
1941					
6/30	U. S. Engineers	Memphis, Tenn.	Cairo	Cairo	Vessel Storage
8/30	American Barge Line	Louisville, Ky.	Louisville, Ky.	Cairo, Ill.	Misc. Cargoes
9/25	U. S. Engineers	Memphis	Cairo, Ill.	Alton, Ill.	
9/26	Union Barge Line	Pittsburgh	Memphis, Tenn.	Memphis, Tenn.	Furnishing Steam
10/26	American Barge Line	Louisville, Ky.	Cairo	Cairo	Charter
10/30	T. L. Herbert & Son	Nashville, Tenn.	Cairo	Cairo	Misc. Cargo
11/19	Chotin & Pharr, Inc.	New Orleans, La.	Cairo	Oil Creek, Ind.	Charter
11/30	American Barge Line	Louisville, Ky.	Cairo	Ohio River used on Cumb. River	Charter
12/18	Union Barge Line	Pittsburgh, Pa.	Cairo	Cairo	Charter
12/31	American Barge Line	Louisville, Ky.	Louisville, Ky.	Memphis	Misc. Cargo
1942					
2/24	Union Barge Line	Pittsburgh, Pa.	Cairo	Cairo	Charter
3/10	Marquette Cement Co.	Cape Girardeau, Mo.	Cairo	Cairo	Charter
3/27	Standard Oil Co. of N. J.	New York	Baton Rouge, La.	Midland, Pa.	Gasoline
3/31	American Barge Line	Louisville, Ky.	Cairo, Ill.	Louisville, Ky.	Misc. Cargo
			Louisville	Memphis	

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[fol. 227]

THE BARRETT LINE, INC.
1121 Chamber of Commerce Bldg.,
Cincinnati, Ohio

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Date of Invoice	Customer	Address	Origin	Destination	Commodity
1942					
4/8	American Barge Line	Louisville, Ky.	Memphis	Cairo	Misc. Cargo
5/9	Standard Oil Co. of N. J.	New York	Baton Rouge, La.	Memphis	Gasoline
5/23	Gulf Oil Corp.	Pittsburgh, Pa.	Plaquemine, La.	North Bend, Ohio	Furnace Oil
6/15	do	do	New Orleans, La.	do	Furnace Oil
6/27	Standard Oil Co. of N. J.	New York	Baton Rouge, La.	Midland, Pa.	Gasoline
6/18	Standard Oil Co. of Ohio	Cleveland, Ohio	Cairo	Cairo	Charter
7/9	do	do	do	do	Charter
7/15	Gulf Oil Corp.	Pittsburgh, Pa.	Plaquemine, La.	North Bend, Ohio	Furnace Oil
8/6	do	do	Baton Rouge, La.	do	do
8/8	Standard Oil Co. of Ohio	Cleveland, Ohio	Cairo	Cairo	Charter
8/11	Standard Oil Co. of N. J.	New York	Baton Rouge, La.	Midland, Pa.	Gasoline

[fol. 228]

EXHIBIT No. 2

The Barrett Line, Inc.
 121 Chamber of Commerce Bldg.
 Cincinnati, Ohio

Balance Statement
 as of
 June 30, 1942

ASSETS

Cash	\$ 14,431.18
Bonds—U. S.	\$256,700.00
Stocks	\$ 8,100.42
Floating Equipment	\$633,589.94
Accounts Receivable	\$ 22,302.02
	<u>\$935,123.56</u>

Liabilities

Accounts Payable	\$ 2,644.39
Preferred Stock outstanding	\$220,000.00
Common Stock outstanding	\$ 25,080.00
Surplus and Undivided Profits	\$317,450.43
Depreciation Reserve	\$370,028.74
	<u>\$935,123.56</u>

THE BARRETT LINE, INC.

SCHEDULE

SHOWING

Minimum Rates and Charges

APPLYING ON

VARIOUS COMMODITIES

AND

Special Services

BETWEEN AND AT POINTS IN

ALABAMA
ARKANSAS
ILLINOIS
INDIANA
IOWA
KENTUCKY
LOUISIANA

WISCONSIN

MINNESOTA
MISSISSIPPI
MISSOURI
OHIO
PENNSYLVANIA
TENNESSEE
WEST VIRGINIA

Governed by Rules, Regulations and Charges published herein.

ISSUED FEBRUARY 26, 1941**EFFECTIVE MARCH 1, 1941**

ISSUED BY

O. SLACK BARRETT, President,
11th Floor Chamber of Commerce Building,
CINCINNATI, OHIO

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Burlington, Ia.		
Cairo, Ill.		
Cincinnati, Ohio.		
Dubuque, Ia.		
Evansville, Ind.		
Helena, Ark.		
Huntington, W.Va.		
Louisville, Ky.	100	
Memphis, Tenn.		
Minneapolis and St. Paul, Minn.		
Muscatine, Ia.		
New Orleans, La.		
Peoria, East Peoria and Pekin, Ill.		
Pittsburgh, Pa.		
Rock Island, Ill., Bettendorf, Ia., Davenport, Ia., East Moline and Moline, Ill.		
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INDEX OF COMMODITIES ON WHICH RATES APPLY

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Barges, Empty, Towing Rates.	25	Rates.	30	Rails.	15
Barges, Loaded, Towing Rates	25	Fuel Flats, Empty, Towing		Structural.	20
Barges, Rental or Charter,		Rates.	25	Pig Iron.	10
Rates.	30				

EXPLANATION OF ABBREVIATIONS

Abbreviation	Explanation	Abbreviation	Explanation
Ala.	Alabama.	Miss.	Mississippi.
Co.	Company.	Mo.	Missouri.
etc.	Etcetera.	No.	Number.
Ill.	Illinois.	Nos.	Numbers.
Ind.	Indiana.	O.	Ohio.
I.C.C.	Interstate Commerce Commission.	Pa.	Pennsylvania.
Ia.	Iowa	Pres.	President.
Inc.	Incorporated	St.	Saint or Street.
inc.	Inclusive	Tenn.	Tennessee.
Ky.	Kentucky.	viz.	namely.
La.	Louisiana.	Wt.	Weight.
Minn.	Minnesota	W. Va.	West Virginia.

EXPLANATION OF REFERENCE MARKS

Reference Mark	EXPLANATION
↓	Denotes Reduction.
↑	Denotes Increase.
Δ	Denotes changes, the result of which is neither an increase nor a reduction.

INDEX OF SPECIFIC POINTS FROM WHICH RATES APPLY

POINTS	Page No.	POINTS	Page No.
Breckenridge, Pa.	8	Florence, Ala.	8
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For explanation of abbreviations and reference marks, see above.

APPLICATION OF RATES

RULE NO.	APPLICATION OF RATES																						
1	<p align="center">DESCRIPTION OF TERRITORY SERVED</p> <p>The territory served by The Barrett Line, Inc. embraces all ports or places accessible to boats and barges located on the following Waterways, or tributaries thereof, of the Mississippi System:</p> <table border="0"> <tr> <td align="center">Name of Waterway</td><td align="center">Name of Waterway</td></tr> <tr> <td>Allegheny River</td><td>Monongahela River</td></tr> <tr> <td>Arkansas River</td><td>Muskingum River</td></tr> <tr> <td>Cumberland River</td><td>Obion River</td></tr> <tr> <td>Forked Deer River</td><td>Ohio River</td></tr> <tr> <td>Green River</td><td>Red River</td></tr> <tr> <td>Illinois River (Grafton to Peoria, Ill.)</td><td>St. Francis River</td></tr> <tr> <td>Kanawha River</td><td>Tennessee River</td></tr> <tr> <td>Kentucky River</td><td>Wabash River</td></tr> <tr> <td>Licking River</td><td>Wolf River</td></tr> <tr> <td>Mississippi River</td><td>Yazoo River</td></tr> </table>	Name of Waterway	Name of Waterway	Allegheny River	Monongahela River	Arkansas River	Muskingum River	Cumberland River	Obion River	Forked Deer River	Ohio River	Green River	Red River	Illinois River (Grafton to Peoria, Ill.)	St. Francis River	Kanawha River	Tennessee River	Kentucky River	Wabash River	Licking River	Wolf River	Mississippi River	Yazoo River
Name of Waterway	Name of Waterway																						
Allegheny River	Monongahela River																						
Arkansas River	Muskingum River																						
Cumberland River	Obion River																						
Forked Deer River	Ohio River																						
Green River	Red River																						
Illinois River (Grafton to Peoria, Ill.)	St. Francis River																						
Kanawha River	Tennessee River																						
Kentucky River	Wabash River																						
Licking River	Wolf River																						
Mississippi River	Yazoo River																						
5	<p align="center">CARGO INSURANCE</p> <p>Except as otherwise provided herein, the rates named do not include cargo insurance.</p>																						
10	<p align="center">MINIMUM WEIGHTS GOVERNED BY OPERATING CONDITIONS</p> <p>Rates on commodities moving under the provisions of this schedule will be subject to the minimum weights provided in connection with such rates, except that, in cases where the Operating Department of the Barrett Line, Inc., requires less than minimum loading due to operating conditions, the minimum weight will be that fixed by the Operating Department.</p>																						
15	<p align="center">"NET TON", MEANING OF THE TERM</p> <p>The term "net ton", when used in schedules, means a ton of 2,000 pounds.</p>																						
20	<p align="center">"GROSS TON", MEANING OF THE TERM</p> <p>The term "gross ton", when used in schedules, means a ton of 2,240 pounds.</p>																						
25	<p align="center">CARETAKERS</p> <p>Rates named on river equipment owned by shipper include transportation of caretakers employed by shipper, subject to the following charges per person for food or lodging when required:</p> <p>(a) Food--\$1.00 per day, or fraction thereof.</p> <p>(b) Lodging--50 cents per day.</p>																						
30	<p align="center">POINTS OF DESTINATION, APPLICATION OF RATES AT</p> <p>Except as otherwise specifically provided herein, rates named do not include the cost of loading or unloading of barges, demurrage, storage, transfer, wharfage, or other terminal charges.</p>																						
35	<p align="center">RATES FROM OR TO INTERMEDIATE PORTS</p> <p>When any shipment originates at or is destined to a port on the routes to which no rate is specifically named herein, the rate applicable shall be that in effect from or to the next more distant port on the same route.</p>																						
RULE NO.	RULES AND REGULATIONS																						
RULE NO.	EXPLANATION																						
40	<p align="center">CONDITIONS UNDER WHICH COMMODITIES ARE TRANSPORTED</p> <p>Section 1--</p> <p>(a) The liability of the Carrier shall be as at Admiralty law as modified by valid and applicable statutes, except as hereinafter provided.</p> <p>(b) Carrier is not bound to transport the goods by any particular tow or vessel or in time for any particular market or otherwise than with reasonable dispatch.</p> <p>(c) In case of quarantine the goods may be discharged at risk and expense of owner into quarantine depot or elsewhere as required by quarantine regulations or authorities or for Carrier's dispatch at nearest available point in Carrier's judgment and in any such case Carrier's responsibility shall cease when property is so discharged, or property may be returned by Carrier at owner's expense to shipping point earning freight charges both ways. Quarantine expenses of whatever nature or kind upon or in respect to the goods shall be borne by the owner of the goods and be a lien thereon. The Carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities, even though the same may have been done by Carrier's officers, agents or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof. Carrier shall not be liable except in case of negligence for any mistake or inaccuracy in any information furnished by the Carrier, its agents or officers, as to quarantine laws or regulations. The Shipper shall protect and hold the Carrier harmless from any expense incurred or damages required to be paid by reason of the introduction of the goods into any place against the quarantine laws or regulations in effect at such place.</p> <p>(d) Liberty is granted to change the makeup of the tow, to assist vessels under all conditions, to deviate for the purpose of making repairs, baling, cooerage, trimming, taking on fuel, ship's supplies and equipment, loading or discharging cargo, crew, or other persons having business with the tow, remaking the tow, picking up or meeting other tow or other towboat or towboats, dropping or delivering any part of the tow; any or all of which liberties are extended whether exercised in connection with or for the purposes of the instant voyage, shipment, cargo or tow, or not.</p> <p>(e) Neither the Carrier, its agents or vessels, shall be responsible for loss, detriment or damage to cargo in connection with the custody, care, or handling thereof prior to loading on and subsequent to discharge from the vessel.</p> <p align="right">(Concluded on following page)</p>																						
For explanation of abbreviations and reference marks, see page 3.																							

RULES AND REGULATIONS

RULE NO.	EXPLANATION
	<p align="center">CONDITIONS UNDER WHICH COMMODITIES ARE TRANSPORTED</p>
	<p>Section 1—Concluded. (f) Neither the Carrier nor the vessel shall be liable for any claim whatsoever, whensoever, and howsoever occurring, arising from compliance by the Carrier with any directions whatsoever by any government or by any person purporting to act under authority thereof.</p>
	<p>Section 2— (a) Except where such service is required as the result of Carrier's negligence, all property shall be subject to necessary coopersage and baling at owner's costs.</p>
	<p>(b) Property not removed by the party entitled to receive it within the free time allowed (See Rule 80 herein) after notice of the arrival of the property at destination has been duly sent or given and after placement of property for delivery at destination has been made, may be kept in vessel, warehouse, or place of delivery of Carrier, subject to charge or lien for storage, or at the option of Carrier may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place at the cost of the owner and there held without liability on the part of Carrier and subject to a lien for freight and all other lawful charges, including a reasonable charge for storage.</p>
	<p>(c) In the event a care party is named, delivery to such care party shall constitute right delivery by the Carrier or vessel of the goods covered hereby, and thereupon liability of Carrier with respect to the delivery of the goods shall terminate.</p>
	<p>Section 3— (a) Neither Carrier nor any vessel furnished by Carrier shall be liable for loss, detriment or damage either to the goods or to any vessel arising or resulting from any of the following causes: Act, neglect or default of the master, mariner, pilot, crew or any servant or servants of the Carrier in navigation, or in the management of the towboat, towed vessels or flotilla; act of God, fire, explosion, bursting of boilers or breakage of shafts, unless such loss or damage is caused by the design or negligence of the Carrier; perils, dangers and accidents of the rivers, lakes or waters; act of war, act of public enemies; waste or restraint by princes or rulers or seizure under legal process or submission to legal authority or color thereof; act or omission of the Shipper or owners of the goods, his agent, servant or representative; strikes or lockouts or stoppage or restraint of liberty, whether partial or general, from whatever cause; riots or civil commotion; saving or attempting to save life or property on the rivers, lakes or other waters, wastage or shrinkage in bulk or weight; mold, heating or ship sweat; insufficiency or inadequacy of marks or other identification; latent defects not discoverable by due diligence; any loss, detriment or damage whatsoever arising from inherent quality of the goods or inherent vice or defect of the goods; improper lading or trimming where the same is done by the Shipper, its agent, or servants; and neither Carrier nor any vessel furnished by Carrier shall be liable for loss, detriment or damage arising or resulting from unseaworthiness (unless caused by want of due diligence on the part of the Carrier to make the towboat or towboats and towed vessels furnished by carriers seaworthy at the commencement of the voyage or to secure that the towboat, is properly manned, equipped and supplied at the commencement of the voyage) or from insufficiency of package or seizure under legal process or from any deviations.</p>
40 (Concluded)	<p>Section 4— All claims for which Carrier or any of its vessels may be liable shall be settled on the value declared hereon by the Shipper or on the net invoice cost plus disbursements, whichever shall be the least. Carrier shall not be liable for any profit or from consequential or special damages and shall have the option of replacing any lost or damaged goods.</p>
	<p>Section 5— General average shall be payable according to York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby, according to the laws and usages of the Port of New York. The general average in each instance shall be prepared by average adjuster selected by the Carrier. In case of danger, damage or involving loss, detriment or damage to the goods resulting from any cause, whether due to negligence or not, for which or for the consequences of which the Carrier is not responsible by statute or contract or otherwise, the Shipper, consignee or owner of the cargo shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo, and the Shipper, consignee and owners shall hold the carriers and vessels harmless as to any claim or recovery against Carrier or any vessel by any third person, party, vessel or interest of all or any part of any sum hereafter paid or becoming due to the Carrier hereunder. Salvage service rendered to the goods by any vessel owned by or in the service of Carrier shall be paid for as fully as if such vessel were owned by strangers.</p>
	<p>Section 6— Carrier, or any party liable on account of any loss, detriment or damage to any of the goods shall at the election of Carrier have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not void the policies or contracts of insurance; provided, that the Carrier reimburse the claimant for the premium paid thereon.</p>
	<p>Section 7— (a) In case of any actual or apprehended loss, detriment or damage, the Carrier, Shipper, owner and receiver shall each give the others all reasonable information as to the whereabouts of the goods and after arrival access thereto for inspection, survey and tallying.</p>
	<p>(b) As a condition precedent to recovery, claims must be filed in writing with the Carrier (1) if loss or damage is apparent before discharge of the goods; (2) if loss or damage is not apparent within three days next after discharge of the goods; (3) in case of failure to make delivery, within thirty days after the time when delivery should have been made. Suits shall be instituted against the Carrier only within nine months after claim is filed. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provision, Carrier shall not be liable and the claim shall not be paid.</p>
45	<p align="center">BOOKING OF CARGO, RULE GOVERNING Rates published herein, pursuant to contract, apply only when a specific prior booking with the Traffic Department of the Barrett Line, Inc. is made for a fixed amount of cargo and a definite time named when such cargo will be ready for movement from port of origin.</p>
50	<p align="center">BULKHEADS When commodities transported require bulkheads to provide proper stowage, such bulkheads will be furnished without charge by carrier.</p>
For explanation of abbreviations and reference marks, see page 3.	

RULE NO.	EXPLANATION
55	<p align="center">CHANGE IN NAME OF PORT OR ESTABLISHMENT OF NEW PORT</p> <p>In the event of change of name of any port, the rules applicable to the old port will apply to the new port until schedule is amended or reissued. If a new port is established, the rules applicable at the nearest port named herein will apply.</p>
60	<p align="center">PACKING SPECIFICATIONS</p> <p>Where packing specifications are not provided herein, articles will be taken in any form of shipment, namely; "loose" or "in bulk" or "in packages" or "on skids".</p>
65	<p align="center">REISSUE OF ITEMS OR RULES</p> <p>Wherever reference is made herein to individual Items or Rules, it shall be understood that such references are continuous and therefore include successive issues or amendments thereto.</p>
70	<p align="center">SUPPLEMENTS TO AND REISSUES OF SCHEDULES</p> <p>Wherever reference is made herein to any other publication, it should be understood that such references are continuous and therefore include supplements to or successive issues or amendments thereto.</p>
75	<p align="center">REFUSED OR UNCLAIMED CARGO</p> <p>1. Where cargo reaches destination and is unclaimed or refused, notice shall be promptly sent or given to the shipper. 2. When shipper requests that notice of unclaimed or refused cargo be sent by telegraph, this may only be done at his expense.</p>
80	<p align="center">DEMURRAGE RULES AND CHARGES (See Exceptions)</p> <p>All commodities transported by The Barrett Line, Inc., shall be subject to the following rules and charges covering loading or unloading of barges:</p> <p>Section 1-- Computing time: Time shall be computed from the first 7:00 a.m. after placement of barge for loading or unloading. (See Note)</p> <p>Section 2-- Rules Applicable on all Commodities:</p> <p>(a) Free Time: Five days' free time (Sundays and legal holidays included) will be allowed at port of origin for loading and five days free time (Sundays and legal holidays included) will be allowed at port of destination for unloading.</p> <p>(b) Charge After Expiration of Free Time: After expiration of free time the following charges per day (Sundays and legal holidays included) shall be paid by shipper for each day, or fraction of day, until barge is loaded and forwarding instructions furnished to carrier or barge is unloaded and made available to carrier.</p> <ol style="list-style-type: none"> \$ 7.50 on open shell fuel barges. \$20.00 on barges of 1,200 tons or less capacity. \$25.00 on barges of over 1,200 tons capacity. <p>Section 3-- Rule Applicable on Barges Furnished but not Used: Barges placed for loading and not used by shipper ordering same shall be subject to demurrage at the rates stated in Section 2 above, time to be computed from the first 7:00 a.m. after placement of barge to first 7:00 a.m. after receipt of notice from shipper, with no free time allowance.</p> <p>Section 4-- Rule Applicable on Reconsignment: Cargo reconsigned will be subject to demurrage charges stated in Section 2 above following the expiration of 24 hours from the first 7:00 a.m. after arrival at the original port of destination.</p> <p>Note--When placement for unloading cannot be accomplished, for reasons not chargeable to Carrier, time shall be computed from the first 7:00 a.m. following arrival of barge at port of destination or point held until barge is unloaded.</p> <p>Exceptions:</p> <p>(a) No demurrage shall be assessed for delays in the loading or unloading of barges caused by ice, floods, low water, or other navigation conditions beyond the control of the shipper.</p> <p>(b) No demurrage shall be assessed where rates applicable on the commodities loaded in the barge include the cost of loading or unloading, except when delay is chargeable to the shipper or consignee, in which case demurrage shall accrue as stated in Section 2 above, according to the commodity loaded or unloaded.</p> <p>(c) On barges stopped in transit to complete loading or partial unloading, demurrage charges shall be assessed from the first 7:00 a.m. following placement at the stop-off port on basis stated in Section 2 above, according to the commodities loaded or unloaded.</p>
90	<p align="center">BARGES FURNISHED AND NOT USED</p> <p>When barges are furnished on order from shipper for loading and not used for loading, charges will be assessed on basis of towing rate for empty barges for round-trip distance from original port of origin plus charter or rental basis for time barge is out of service of carrier.</p>
For explanation of abbreviations and reference marks, see page 3.	

PORT LIMITS

RULE NO.	EXPLANATION
100	<p>The Port Limits of the following ports served by The Barrett Line, Inc., are as follows:</p>
	<p>ASHLAND, KY.</p> <p>The Ashland, Ky., Port Limits embrace all plants, warehouses, industries, etc., located within the territory bounded by the Norfolk and Western Railway Bridge at Kenova, W.Va., to and including Russell, Ky., on both sides of the river to the extent that such plants, warehouses, or industries may have facilities for the receipt and/or delivery of freight direct from or to barges.</p>
	<p>BATON ROUGE, LA.</p> <p>The Baton Rouge, La., Port Limits embrace the Municipal River Terminal and all plants, warehouses, industries, etc., located in the Corporate limits of Baton Rouge to the extent that such plants, warehouses or industries may have facilities for the receipt and/or delivery of freight direct from or to barges.</p>
	<p>BURLINGTON, IOWA</p> <p>The Burlington, Iowa, Port Limits embrace the Municipal Docks and all plants, warehouses, industries, etc., located in the Corporate limits of Burlington, to the extent that such plants, warehouses or industries may have facilities for the receipt and/or delivery of freight direct from or to barges.</p>
	<p>CAIRO, ILL.</p> <p>The Cairo Port Limits embrace all points along the North Bank of the Ohio River from Fortieth Street to confluence with the Mississippi River.</p>
	<p>CINCINNATI, OHIO</p> <p>The Cincinnati, Ohio, Port Limits embrace all points along the banks of the Ohio and Licking Rivers, located within the Corporate limits of the City of Cincinnati, Addyston, North Bend, Sekitan, Cleves, and Columbia Park, Ohio, and Melbourne, Stevens, Brent, Fort Thomas, Dayton, Bellevue, Newport, Covington, Ludlow, Andrews and Bromley, Ky., and Sweetwine, Ohio.</p>
	<p>DUBUQUE, IOWA</p> <p>The Dubuque, Iowa, Port Limits embrace the Municipal Docks and all plants, warehouses, industries, etc., located in the Corporate Limits of Dubuque to the extent that such plants, warehouses, or industries may have facilities for the receipt and/or delivery of freight direct from or to barges.</p>
	<p>EVANSVILLE, IND.</p> <p>The Evansville, Ind., Port Limits embrace all plants, warehouses, industries, etc., located in the Corporate Limits of Evansville to the extent that such plants, warehouses or industries may have facilities for the receipt and/or delivery of freight direct from or to barges.</p>
	<p>HELENA, ARK.</p> <p>The Helena, Ark., Port Limits embrace the Municipal River Terminal and all plants, warehouses, industries, etc., located in the Corporate limits of Helena to the extent that such plants, warehouses or industries may have facilities for the receipt and/or delivery of freight direct from or to barges.</p>
	<p>HUNTINGTON, W.VA.</p> <p>The Huntington, W.Va., Port Limits embrace all plants, warehouses, industries, etc., located in the territory embraced by U.S. Lock and Dam No. 28 to the Guyandotte River, including locations on both sides of the river to the extent that such plants, warehouses and industries may have facilities for the receipt and/or delivery of freight direct from or to barges.</p>
	<p>LOUISVILLE, KY.</p> <p>The Louisville, Ky., Port Limits embrace the Ohio River Terminal and Warehouse Co., and all plants, warehouses, industries, etc., located in the Corporate limits of Kosmosdale and Louisville, Ky., Jeffersonville and New Albany, Ind., to the extent that such plants, warehouses or industries have facilities for the receipt and/or delivery of freight direct from or to barges.</p>
	<p>MEMPHIS, TENN.</p> <p>The Memphis, Tenn., Port Limits embrace all points along the banks of the Mississippi and Wolf Rivers, Nocomah Creek to the crossing of the Union Railroad at Wolf River, including Hopefield and West Memphis, Arkansas.</p>

(Concluded on following page)

For explanation of abbreviations and reference marks, see page 3.

PORT LIMITS

RULE NO.	EXPLANATION
100 (Concluded)	<p align="center">MINNEAPOLIS AND ST. PAUL, MINN.</p> <p>The Minneapolis and St. Paul, Minn., Port Limits embrace the Municipal River Terminals, respectively and all plants, warehouses, industries, etc., located in the Corporate limits of Minneapolis and St. Paul, Minn., to the extent that such plants, warehouses or industries may have facilities for the receipt and/or delivery of freight direct from or to barges.</p>
	<p align="center">MUSCATINE, IA.</p> <p>The Port Limits of Muscatine, Ia., include all points in Corporate Limits, the Municipal Coal Dock and Plants, warehouses or industries having facilities for receipt and/or delivery of freight direct from or to barges within three miles south of Corporate limits.</p>
	<p align="center">NEW ORLEANS, LA.</p> <p>New Orleans, La., harbor will be understood to embrace all points along the banks of the Mississippi River between Avondale, La., and Violet, La., both inclusive, also all points on the banks of the Inner Harbor Navigation Canal (Industrial Canal) between the Mississippi River and Lake Pontchartrain.</p>
	<p align="center">PEORIA, ILL. EAST PEORIA, ILL. PEKIN, ILL.</p> <p>The Peoria, Ill., Port Limits embrace all plants, warehouses and industries, including the Municipal Docks, having wharf facilities for the receipt and delivery of freight directly from and to barges and located within the Corporate limits of the City of East Peoria, Ill., the City of Pekin, Ill., and Peoria, Ill.</p>
	<p align="center">PITTSBURGH, PA.</p> <p>The Pittsburgh, Pa., Port Limits embrace all points along the banks of the Ohio, Allegheny and Monongahela Rivers, extending from Pittsburgh to Rochester, Pa. along the Ohio River and to Braddock and Blaw-Knox, Pa., including Neville Island, Brunot Island, and points on both sides of the rivers to the extent that such plants warehouses or industries may have facilities for the receipt and/or delivery of freight direct from or to barges.</p>
	<p align="center">ROCK ISLAND, ILL. BETTENDORF, IA. DAVENPORT, IA. EAST MOLINE, ILL. MOLINE, ILL.</p> <p>The Rock Island, Ill., Port Limits embrace all plants, warehouses and industries, including the Municipal Docks having wharf facilities for the receipt and delivery of freight directly from and to barges and located within the Corporate limits of the City of Bettendorf, Iowa, and the City of Davenport, Iowa, also the cities of East Moline, Moline and Rock Island, Ill.</p>
	<p align="center">ST. LOUIS, MO. AND EAST ST. LOUIS, ILL.</p> <p>The St. Louis-East St. Louis Port Limits embrace all points along the banks of the Mississippi River, Jefferson Barracks, Mo., to Alton, Ill., and points on the east bank of the Mississippi River directly opposite points on the west bank named above.</p>
	<p align="center">VICKSBURG, MISS.</p> <p>The Vicksburg Port Limits will embrace all points along the East Bank of the Mississippi River, beginning at the Refuge Cotton Oil Company, thence to the mouth of the Yazoo Canal, thence along the banks of the Yazoo Canal to the Northwest corner of the City limits.</p>

MINIMUM RATES
(Rates in Cents)

Item No.	COMMODITY	FROM	TO	Rate per Vehicle
5	Vehicles, Automobiles, Freight or Passenger, New or Old. Minimum 300 vehicles.	Cincinnati . . . Ohio	Cairo Ill. Evansville . . . Ind. Memphis Tenn. New Orleans . . . La. St. Louis Mo. Vicksburg . . . Miss.	900 600 2000 4000 2000 3000
		Evansville . . . Ind.	Cairo Ill. Memphis Tenn. New Orleans . . . La. St. Louis Mo. Vicksburg . . . Miss.	600 1700 3700 1700 2700
		St. Louis Mo.	Evansville . . . Ind. Cairo Ill. Memphis Tenn. New Orleans . . . La. Vicksburg . . . Miss.	1000 700 1700 3700 2700

For explanation of abbreviations and reference marks, see page 3.

MINIMUM RATES (Rates in Cents per ton)					
Item No.	COMMODITY	FROM	TO	Rate Per Gross Ton	
10	Iron or Steel Articles, viz.: Pig Iron. Minimum 3,000 gross tons.	DecaturAla.	BrookportIll.	90	
		FlorenceAla.	East St. LouisIll.	175	
		SheffieldAla.	JoppaIll.	90	
			St. LouisMo.	175	
		Point PleasantW. Va.	CincinnatiOhio	60	
			LouisvilleKy.	85	
15	Iron or Steel Articles, viz.: Rails. Minimum 4,000 gross tons.	BreckenridgePa.	CairoIll.	250	
		ClairtonPa.	CaruthersvilleMo.	275	
		PittsburghPa.	CincinnatiOhio	150	
		WheelingW. Va.	EvansvilleInd.	200	
			LouisvilleKy.	175	
			MemphisTenn.	300	
			New OrleansLa.	450	
			PaducahKy.	250	
		VicksburgMiss.	375		
20	Iron or Steel Articles, viz.: Pipe, Structural. Minimum 3,000 net tons.	BreckenridgePa.	CairoIll.	350	
		ClairtonPa.	CincinnatiOhio	250	
		PittsburghPa.	GreenvilleMiss.	500	
		WheelingW. Va.	LouisvilleKy.	300	
			MemphisTenn.	450	
			New OrleansLa.	700	
			OwensboroKy.	325	
			St. LouisMo.	500	
		VicksburgMiss.	550		
Item No. 25					
MINIMUM RATES FOR TOWING SERVICE ON RIVER EQUIPMENT, viz.: (Rates in dollars and cents, except as shown)					
DESCRIPTION		BETWEEN	RATE		
			Per Mile		
			(a)	(b)	(c)
River Equipment, viz.: Barges, Empty.		Between All Ports.	\$.50	\$.75	\$ 1.00
Fuel Flats, Empty.		Between All Ports.	35 cents per mile		
All Commodities in Barges, Minimum Weight 500 Net tons. Note—Subject to a minimum charge of \$100.00.		Between All Ports.	Upstream—2½ mills per net ton—per mile Downstream—1½ mills per net ton—per mile (See Note)		
(a) Applies on barges of 175 feet or less in length. (b) Applies on barges over 175 feet in length and not over 225 feet. (c) Applies on barges over 225 feet in length.					
Item No. 30					
MINIMUM RATES COVERING CHARTER OR RENTAL OF VESSELS (Rates in dollars and cents)					
KIND OF VESSEL			Rate (See Note)		
			Per Day	Per Hour	
Tow Boats, viz.:					
500 horse-power or less			\$ 175.00	\$ 10.00	
900 horse-power and over 500			300.00	20.00	
1250 horse-power and over 900			350.00	20.00	
Derrick Boats:			Per Calendar Day		
With crew, fuel, maintenance, stores to operate boat			\$ 45.00		
Without crew, etc. (bare boat)			20.00		
With Engineer and Fireman, but without fuel, stores, etc.			35.00		
Tow Boats (Bare, without crew, etc.)					
500 horse-power or less			30.00		
1250 horse-power and over 500			100.00		
(Concluded on following page)					
For explanation of abbreviations reference marks, see page 3.					

Item No. 30—Concluded		MINIMUM RATES Covering CHARTER OR RENTAL OF VESSELS (Rates in dollars and cents)	
KIND OF VESSEL		Rate (See Note)	
		Per Calendar Day	
Barges, Empty, viz.: Fuel Flats 240 feet or less in length		\$ 4.00 15.00	
<p>Note—(a) Rates on Steam operated tow boats include crew, fuel, maintenance, rigging and stores to operate boat, and also insurance of tow boat. (b) Time will be computed from time of departure under lease, until boat is returned to service of carrier.</p>			
Item No. 35		MINIMUM RATES for STORAGE OF VESSELS at PORT FACILITIES OF CARRIER (Rates in cents per day or fraction of a day)	
DESCRIPTION		Rate	
Barges, Empty		200	
Barges, Loaded		200	
<p>For explanation of abbreviations and reference marks, see page 3.</p>			

Supplement No. 1
to
I. C. C. No. 1
Supplement No. 1 contains
all changes

THE BARRETT LINE, INC.

step

SCHEDULE
Showing
MINIMUM RATES AND CHARGES

Applying on
VARIOUS COMMODITIES

and
SPECIAL SERVICES

Between and at points in

step

ALABAMA
ARKANSAS
ILLINOIS
INDIANA
IOWA
KENTUCKY
LOUISIANA

WISCONSIN

MINNESOTA
MISSISSIPPI
MISSOURI
OHIO
PENNSYLVANIA
TENNESSEE
WEST VIRGINIA

step

Governed by Rules and Regulations Published in schedule, and as amended.

ISSUED August 12, 1942.

EFFECTIVE September 14, 1942.

Issued by
O. SLACK BARRETT, PRESIDENT,
11th Floor Chamber of Commerce Building,
CINCINNATI, OHIO.

APPLICATION OF RATES

Rule No.	Application		
	<u>Substitute the following for matter shown on page 4 of schedule.</u>		
	<u>DESCRIPTION OF TERRITORY SERVED</u>		
	<p>The rates, charges, rules and regulations published in schedule apply from, to or between and at ports, landings and points named in:</p> <p>R. A. Ellison, Agent, I.C.C. No. 1 List of and Distances Between Ports, Landings and Points Located on Inland Waterways</p>		
1A Cancels 1	and indicated below and indexed in said tariff as follows:		
(Continued)	<u>Index No.</u> 3989 to 4039 4354 to 4526-1 4286 to 4342-1 1732 to 1821-1	<u>ALLEGHENY RIVER</u> <u>CUMBERLAND RIVER</u> <u>GREEN RIVER</u> <u>ILLINOIS RIVER</u>	<u>Port</u> Corydon, Pa. to Pittsburgh (Allegheny River), Pa. Confluence Daney Fork River, Tenn. to Cumberland River Mouth (Cumberland River), Ky. Mammoth Cave Ldg. Ky. to Green River Mouth (Green River), Ky. Peoria, Ill. to Grafton (Illinois River), Ill.
	(Continued on page 3)		

(Continued on
page 3)

For explanation of abbreviations and reference marks, see page 3 of schedule.

Rule No.	Application	
	<u>DESCRIPTION OF TERRITORY SERVED</u> (Continued)	
	<u>Index No.</u>	<u>Port</u>
	<u>*KANAWHA RIVER</u>	
	4142 to 4196-1	Kanawha River (Head) W.Va. T to Kanawha River Mouth (Kanawha River), W.Va.
	<u>*KENTUCKY RIVER</u>	
	4237 to 4285-1	Head of Navigation (Ky. River), Ky. to Carrollton (Mouth of Ky. River- Ky. River), Ky.
	<u>*LICKING RIVER</u>	
1A Cancels 1	4227 to 4231	Licking River Mouth (Licking River), Ky. to Latonia, Ky.
(Con- tinued)	<u>*MISSISSIPPI RIVER</u> (Middle and Upper)	
	1 to 370	Minneapolis, Minn. to Ohio River Mouth (Middle and Upper Mississippi River)
	<u>*MISSISSIPPI RIVER</u> (Lower)	
	373 to 1651	Ohio River Mouth (Lower Mississippi River) to Head of Passes, La.
	8 (Addition) <u>*MISSOURI RIVER</u>	
	1905 to 2070	Sioux City, Ia. to Mouth of Missouri River (Missouri River), Mo.

(Concluded on
Page 4)

For explanation of abbreviations and reference marks, see page 3 of schedule.

Rule No.	Application	
	<u>DESCRIPTION OF TERRITORY SERVED</u> (Continued)	
	<u>Index No.</u>	<u>Port</u>
		<u>MONONGAHELA RIVER</u>
	3931 to 3988-1	Fairmount, W.Va. to Pittsburgh (Monongahela River) Pa.
		<u>OHIO RIVER</u>
	2880 to 3930	Pittsburgh (Ohio River) Pa. to Ohio River Mouth, (Ohio River)
1A Cancels		<u>RED RIVER</u>
1	5464-1 to 5488	Angola (Red River), La. to Mouth of Black River (Red River), La.
(Continued)		<u>TENNESSEE RIVER</u>
	4527 to 4958	Tennessee River (Head), Tenn. to Tennessee River Mouth (Tennessee River) Ky.
	<u>Also Points on the following Rivers:</u>	
	<u>ARKANSAS RIVER</u>	
	<u>Point</u>	<u>Miles from Mouth</u>
	Arkansas River Mouth, Ark.	0.0
	Cat Island,	Ark. 3.8
	Murphy,	Ark. 6.0
	Wargo Landing,	Ark. 9.5
	Green Landing,	Ark. 10.8
	Lake Jefferson,	Ark. 15.0
	Head of Cut-off,	Ark. 17.8
	Waddell Landing,	Ark. 22.2
	Yancopin,	Ark. 25.0
	Menards,	Ark. 27.0
		(See Index No. 832 of R. A. Ellison, Agent, I.C.C. No. 1)
		(Continued on page 5)
For explanation of abbreviations and reference marks, see page 3 of schedule.		

Rule No.	Application		
	<u>DESCRIPTION OF TERRITORY SERVED</u>		
	<u>Also Points on the following Rivers:</u> (Continued)		
	<u>FORKED DEER RIVER</u>		
	o Cancel. Not now served.		
	<u>MUSKINGUM RIVER</u>		
	o Cancel. Not now served.		
	<u>OBION RIVER</u>		
	<u>Point</u>	<u>Miles from Mouth</u>	
1A	Mouth of Obion River, Tenn.	0.0	(See Index No. 736 in R. A. Ellison Agent, I.C.C. No. 1)
Cancels			
1	Tyler's Mill, Tenn.	10.0	
(Continued)	<u>St. Francis River</u>		
	<u>Point</u>	<u>Miles from Mouth</u>	
	Mouth of St. Francis River, Ark.	0.0	(See Index No. 736 in R. A. Ellison Agent, I.C.C. No. 1)
	Phillips Bayou, Ark.	3.6	
	L'Anguille River (Mouth), Ark.	11.8	
	Grants Bend, Ark.	16.3	
	Newmans Bend, Ark.	20.7	
	Red Oak Plantation, Ark.	24.6	
	Foot of Cow Bayou, Ark.	29.6	
	Foot of Cut-off, Ark.	36.8	
	Council Bar, Ark.	41.7	
	Lake Side, Ark.	46.8	
	Coon Island Bend, Ark.	50.9	
	Quigley Bend, Ark.	55.6	
	Madison, Ark.	59.7	
	<u>WABASH RIVER</u>		
	o Cancel. Not now used.		
	<u>WOLF RIVER</u>		
	<u>Point</u>	<u>Miles from Mouth</u>	
	Wolf River Mouth (Memphis) Tenn.		(See Rule 100 - Harbor Limit of Memphis Tenn.) (Continued on page 6)

For explanation of abbreviations and reference marks, see page 3 of schedule.

Rule No.	Application																								
	<u>DESCRIPTION OF TERRITORY SERVED</u>																								
	<u>Also Points on</u> <u>the following Rivers:</u> (Concluded)																								
1A	<u>YAZOO RIVER</u>																								
Cancel																									
1																									
(Con- cluded)																									
	<table><tr><th><u>Point</u></th><th><u>Miles from</u> <u>Mouth</u></th><th></th></tr><tr><td>Mouth of Yazoo River (Vicksburg), Miss.</td><td>0.0</td><td>(See Index No. 1011 in R. A. Ellison, Agent, I.C.C. No.1)</td></tr><tr><td>City Landing, Vicksburg, Miss.</td><td>1.3</td><td></td></tr><tr><td>Bayou Steele, Miss.</td><td>11.3</td><td></td></tr><tr><td>Redwood (Yazoo and Mississippi Valley Railroad Bridge), Miss.</td><td>17.8</td><td></td></tr><tr><td>Mouth of Big Sunflower River, Miss.</td><td>46.3</td><td></td></tr><tr><td>Lake George, Miss.</td><td>64.0</td><td></td></tr><tr><td>Holly Bluff Bridge, Miss.</td><td>65.1</td><td></td></tr></table>	<u>Point</u>	<u>Miles from</u> <u>Mouth</u>		Mouth of Yazoo River (Vicksburg), Miss.	0.0	(See Index No. 1011 in R. A. Ellison, Agent, I.C.C. No.1)	City Landing, Vicksburg, Miss.	1.3		Bayou Steele, Miss.	11.3		Redwood (Yazoo and Mississippi Valley Railroad Bridge), Miss.	17.8		Mouth of Big Sunflower River, Miss.	46.3		Lake George, Miss.	64.0		Holly Bluff Bridge, Miss.	65.1	
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(New)	<u>MILEAGES - HOW TO DETERMINE</u>
	Rates named in schedule, or as same may be amended, based on mileage, will be ascertained by the application of distances shown in R. A. Ellison, Agent, I.C.C. No. 1.

Page 9 of Schedule - Amend:

Item No. 25A MINIMUM RATES FOR TOWING SERVICE
 Cancells on River Equipment, viz.:
 Item 25 (Rates in dollars and cents, except as shown)

DESCRIPTION	BETWEEN	RATE		
		Per Mile		
		(a)	(b)	(c)
River Equipment, viz.: Barges, Empty.	*Between All Ports.	\$.50	\$.75	\$ 1.00
Fuel Flats, Empty.	*Between All Ports.	35 cents per mile		
All Commodities in Barges, Minimum Weight 500 Net tons.	*Between All Ports.	Upstream—2½ mills per net ton—per mile Downstream—1½ mills per net ton—per mile (See Note)		

Note—Subject to a minimum charge of \$100.00

(a) Applies on barges of 175 feet or less in length.

(b) Applies on barges over 175 feet in length and not over 225 feet.

(c) Applies on barges over 225 feet in length.

* * See Rule Nos. 1A and 2.

Pages 9 and 10 of Schedule - Amend:

Item No. 30A MINIMUM RATES COVERING
 Cancells CHARTER OR RENTAL OF VESSELS
 Item 30 (Rates in dollars and cents)

KIND OF VESSEL	Rate (See Note)	
	Per Day	Per Hour
*Tow Boats, viz.: "Richard Barrett" 900 horsepower "Patricia Barrett" 1200 horsepower	\$300.00 350.00	\$20.00 20.00
Derrick Boats: * "Patsey Barrett" and "Helen Barrett" With crew, fuel, maintenance, stores to operate boat Without crew, etc. (bare boat) With Engineer and Fireman, but without fuel, stores etc.	Per Calendar Day	
	\$ 45.00 20.00 35.00	
Tow Boats (Bare, without crew, etc.) "Richard Barrett" 900 horsepower "Patricia Barrett" 1200 horsepower	\$100.00	
Barges, Empty, viz.: Fuel Flats: "Bethany", "Galilee", "Natareth" and "Smaria" 200 ft. or less in length: Bell, Ben, Bert, Bess, Bill, Bob, Clara, Charley, Daisy, Dan, Dave, Dick, Dolly, Dot, Elisha, Ollie, Omar, Opal, Ora, Oscar, Otto	5.00 15.00	

Note—(a) Rates on Steam operated tow boats include crew, fuel, maintenance, rigging and stores to operate boat, and also insurance of tow boat.

(b) Time will be computed from time of departure under lease, until boat is returned to service of carrier.

For explanation of abbreviations and reference marks, see page 3 of schedule.

[fol. 246] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON BY APPELLANT—Filed
November 3, 1944

The appellant, The Barrett Line, Inc., both in brief and on oral argument, will rely upon the following points:

1. The District Court erred in refusing to grant the relief prayed for by appellant and in dismissing the complaint.

2. That in its decision of July 28, 1944, the District Court erred in finding that in entering its order of June 18, 1943, here assailed, the Interstate Commerce Commission did not misconceive or misapply its statutory authority and did not act arbitrarily and capriciously and contrary to the evidence.

3. The District Court erred in finding that the Commission did not abuse its discretion, nor act arbitrarily, in entering said order.

4. The District Court erred in failing to find that the order of the Commission is based upon the erroneous premise that for a contract carrier by water to be entitled to a permit under the so-called "grandfather" provisions of section 309 (f) (54 Stat. L. 942) of the Interstate Commerce Act it must have been engaged on and since January 1, 1940, in the transportation of non-exempt commodities, whereas under the provisions of section 302 (c) (54 [fol. 247] Stat. L. 929) a contract carrier by water is defined as a person which under individual contracts or agreements "engages in the transportation by water of passengers or property in interstate or foreign commerce for compensation" and that under section 309 (f) such a carrier is entitled to a permit if on the "grandfather" date and thereafter it was "in bona fide operation as a contract carrier by water".

5. During the critical period appellant engaged in 23 chartering transactions under which it leased or chartered its vessels to various shippers, none of whom are carriers subject to the Interstate Commerce Act, which transactions, under section 302 (c) of that act, constitute the engagement in transportation as a contract carrier by water.

Despite that fact, the Commission found that the appellant was not engaged in bona fide operation as a contract carrier by water during the critical period. The District Court erred in failing to decide that in this finding the Commission acted arbitrarily and contrary to the evidence and the statute.

6. The District Court erred in failing to find that the order of the Commission gives no weight to the fact that for a long period of time appellant has been engaged in the transportation of a wide variety of commodities as a contract carrier by water.

7. The District Court erred in failing to find that the order of the Commission is based upon the erroneous assumption that because at the time of the hearing most of the equipment of appellant was used in the transportation of bulk petroleum products, appellant is not entitled to a permit under section 309 (g) of the Interstate Commerce Act, although the record shows that appellant has four barges, not used in the transportation of oil, which barges, as well as other barges, can be converted for use in the transportation of general cargo.

8. The District Court erred in failing to find that the order of the Commission is based upon the erroneous conclusion that appellant failed to show that it is proposing [fol. 248] a new or continued operation, or that such an operation would be consistent with the public interest and the national transportation policy, since the record shows that appellant does propose to continue its operation and that such operation will be consistent with the public interest and the national transportation policy.

9. The District Court erred in failing to find that the Commission acted arbitrarily and contrary to the statute and the evidence in rejecting and in reversing the findings of the examiner who heard the case and who concluded that the continued operation by appellant will be consistent with the public interest and the national transportation policy.

10. The District Court erred in declining to enjoin and annul the order of the Interstate Commerce Commission as prayed.

Robert E. Quirk, Attorney for Appellant.

[fol. 249]

Acceptance of Service

Service of the within described document and receipt of a copy thereof is hereby acknowledged this 1st day of November, 1944.

By Robert L. Pierce, for Defendant, United States of America. By Allen Crenshaw, for Defendant, Interstate Commerce Commission. By Harry C. Ames, for Intervenor Mississippi Valley Barge Line Co. and Campbell Transportation Co. By William La Roe, Jr., for Intervenor American Barge Line Company. By R. Granville Curry, for Intervenor Union Barge Line Corporation.

[fol. 250] IN THE SUPREME COURT OF THE UNITED STATES

DESIGNATION OF RECORD BY APPELLANT—Filed November 3, 1944

To the United States of America, the Interstate Commerce Commission, Mississippi Valley Barge Line Company, Campbell Transportation Company, American Barge Line Company, Union Barge Line Corporation, or Their Counsel:

Please take notice that pursuant to the statutes and rules of court in such cases made and provided, The Barrett Line, Inc., appellant in the above-entitled cause and in connection with its appeal, makes the following designation of record:

1. Complaint, exclusive of exhibit C attached thereto, which document is not necessary in connection with this appeal.
2. Answer of United States.
3. Answer of Interstate Commerce Commission.
4. Decision of Court.
5. Judgment of Court.
6. Petition for Appeal.
7. Assignment of Errors.
8. Notice of Appeal.
9. Order Allowing Appeal.

[fol. 251] 10. Citation.

11. Record of Proceedings before the Interstate Commerce Commission, including exhibits 1, 2 and 3 which are a part of such record.

12. Clerk's memorandum as to cost of bond.

13. Statement of Points to be Relied on by Appellant.

14. This designation of Record.

Robert E. Quirk, Attorney for Appellant.

[fol. 252] Acceptance of Service

Service of the within described document and receipt of a copy thereof is hereby acknowledged this 1st day of November, 1944.

By Robert L. Pierce, for Defendant, United States of America. By Allen Crenshaw, for Defendant, Interstate Commerce Commission. By Harry C. Ames, for Intervenor Mississippi Valley Barge Line Co. and Campbell Transportation Co. By William La. Roe, Jr., for Intervenor American Barge Line Company. By B. Granville Curry, for Intervenor Union Barge Line Corporation.

[fol. 253] [File endorsement omitted.]

[fol. 254] IN THE SUPREME COURT OF THE UNITED STATES

DESIGNATION OF RECORD BY INTERVENOR—Filed November 10, 1944

To The Barrett Line, Inc.; the United States of America, the Interstate Commerce Commission, American Barge Line Company, Union Line Corporation, or Their Counsel:

Please take notice that pursuant to the statutes and rules of court in such cases made and provided, the Mississippi Valley Barge Line Company and the Campbell Transportation Company, intervenors in the above-entitled cause, make the following designation of record in addition to that made by appellant:

1. Exhibit C as attached to the Complaint.

Harry C. Ames, Attorney for Intervenor.

[fol. 255] Acceptance of Service

Service of the within described document and receipt of a copy thereof is hereby acknowledged this 10th day of November, 1944.

By Robert E. Quirk, for Appellant. The Barrett Line, Incorporated. By Edward Dumbauld, for Defendant United States of America. By David W. Knowlton, for Defendant Interstate Commerce Commission. By Frederick E. Brown, for Intervenor American Barge Line Company. By R. Granville Curry, for Intervenor, Union Barge Line Corporation.

[fol. 255a] [File-endorsement omitted.]

[fol. 256] SUPREME COURT OF THE UNITED STATES

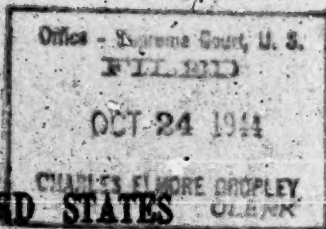
ORDER VOTING PROBABLE JURISDICTION—December 4, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[fol. 257] Endorsed on Cover: File No. 49,083 D. C. U. S., Southern Ohio, Term No. 630. The Barrett Line, Inc., Appellant, vs. The United States of America, Interstate Commerce Commission and Mississippi Valley Barge Line Co., et al. Filed October 24, 1944. Term No. 630 O. T. 1944.

(6209)

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 630

THE BARRETT LINE, INC.,

Appellant,

vs.

**THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION AND MISSISSIPPI VAL-
LEY BARGE LINE CO., ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO**

STATEMENT AS TO JURISDICTION

CHARLES H. STEPHENS, JR.,

ROBERT E. QUIRK,

Counsel for Appellant.

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**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION**

Civil Action No. 881

Filed September 21, 1941

THE BARRETT LINE, INC.,

vs.

Plaintiff,

**THE UNITED STATES OF AMERICA, AND INTER-
STATE COMMERCE COMMISSION,**

Defendants

**JURISDICTIONAL STATEMENT BY PLAINTIFF
UNDER RULE 12 OF THE REVISED RULES OF
THE SUPREME COURT OF THE UNITED STATES.**

The plaintiff-appellant respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

A. Statutory Provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. The Statute of a State, or the Statutes or Treaty of the United States, the Validity of Which Is Involved

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved.

C. Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Was Presented

The decree sought to be reviewed was entered July 28, 1944. The petition for appeal, together with the assignment of errors, was presented September 15, 1944, and was allowed September 15, 1944.

D. Nature of Case and of Rulings

This is an appeal from a final decree of the United States District Court for the Southern District of Ohio, Western Division, which sustained an order of the Interstate Commerce Commission of June 18, 1943, in Docket W-353, *Bar-*

rett Line Inc., Contract Carrier Application, 250 I. C. C. 809. In sustaining the order of the Commission the court below held that the Commission had not misconstrued or misapplied the applicable statute and had not acted arbitrarily in entering the order.

The question presented is whether the court below erred in sustaining the order of the Commission in which the Commission declined to issue a permit to the appellant, which is a contract carrier by water and has been operating as such on the Ohio and Mississippi Rivers and their tributaries for four generations. The appellant seasonably filed an application with the Commission for a permit under the so-called "grandfather" provisions of section 309 (f) of the Interstate Commerce Act and the provisions of section 300 (g) of that act, which deals with the issuance of permits covering new operations. These applications were consolidated and were disposed of by the Commission in one report and on one record.

The appellant performs a towboat service and a barge service. It also performs a freighting service with its own barges, and a towing business on barges owned by others. In addition, it does a chartering business that contemplates the handling of both freight and the supplying of equipment to persons doing chartering. During the period covered by the record before the Commission, the appellant was engaged principally in the transportation of petroleum products in bulk. Under section 303 (b) of the Interstate Commerce Act the transportation by water of commodities in bulk under the conditions described therein, is exempt from the provisions of Part III of the Interstate Commerce Act. However, under section 302 (c) of the act, the furnishing for compensation of a vessel "to a person other than a carrier subject to this act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel

so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water.' The same section provides that the term contract carrier by water means any person which under individual contracts or agreements engages in the transportation "by water of passengers or property in interstate or foreign commerce for compensation."

The evidence before the Commission shows that the appellant and its predecessor have been engaged as a contract carrier by water in the transportation of general cargo on the Ohio and other rivers for more than four generations, and that during the years 1936 to and including August, 1942, appellant engaged in 23 chartering transactions under which it leased or chartered its vessels to various persons, none of whom are carriers subject to the Interstate Commerce Act. By the plain terms of the statute, these chartering transactions are defined as constituting the engagement in transportation as a contract carrier by water. The appellant's tariff, which was filed with the Commission and published in the manner required by its rules and regulations, contains its minimum charges. The tariff provides that appellant will contract to transport all commodities in barges in lots of not less than 500 net tons. Appellant's operations are special in the highest degree. It serves customers under special contracts. It is an irregular operator of river craft.

The examiner of the Commission who heard the evidence served a report in which he found that a permit should be granted to appellant under the provisions of section 309 (g) of the Interstate Commerce Act. The Commission reversed the examiner and held that the appellant was not entitled to a permit either under the "grandfather" provisions of section 309 (f) or under the new operation provisions of section 309 (g). This action was based upon the

2

conclusion by the Commission that on and since the "grandfather" date, January 1, 1940, the appellant had failed to establish that it was in bona fide operation in the performance of transportation subject to Part III of the act. This finding is contrary to the law and to the evidence. In addition, it disregards the plain provisions of section 302 (c), under which the Commission should have found as a minimum that the appellant was engaged in transportation as a contract carrier by water by virtue of its chartering transactions.

In considering the application under section 309 (g) which deals with future operations, the examiner had held that where, as here, the carrier had been engaged in business similar to that for which the permit is sought for a long period of time, consideration may and should be given to the historical background, to the character of service performed with respect to both regulated and unregulated traffic, and to the territory served, and that based on these considerations the Commission should conclude that the continued operation of the applicant will be consistent with the public interest and the national transportation policy.

The Commission reversed the conclusions of the examiner and held that the appellant was not entitled to a permit under the grandfather provisions of section 309 (f) or a permit under the provisions of section 309 (g) to establish new operations. This action was arbitrary and unreasonable. While transportation of petroleum products in bulk is not subject to Part III and while appellant, except for its chartering transactions, has been engaged principally in that character of transportation on and since the "grandfather" date, it has continued this character of service with the encouragement of the Office of Defense Transportation and the Petroleum Administrator. There is no gainsaying the fact that the transportation of petroleum products in barges during the present emergency has not only been in

the public interest, but in the interest of national defense as well.

It is difficult, if not impossible, to square the decision of the Commission in the instant case with its decision in *C. F. Harms Company Application*, 260 I. C. C. 171, with the *Russell Bros. Case*, 250 I. C. C. 429, and with its decision in *Moran Towing and Transfer Company Application*, made July 26, 1944, not yet reported.

The *Per Curiam* decision of the court below does not reveal the reasoning of the court, or the precise grounds on which the order of the Commission was sustained. The chartering transactions of the appellant are enough without more, to have subjected the appellant to the provisions of Part III of the Interstate Commerce Act and to have entitled it under the statute to a so-called "grandfather" permit since the statute section 302 (e) plainly provides that such transactions constitute the engaging in transportation for compensation within the meaning of the definition of a contract carrier by water, and since such a contract carrier by water who was in bona fide operation on the "grandfather" date and thereafter, as was the appellant, is entitled under the provisions of section 309 (f) to a permit upon the filing of an application and a showing that it was so engaged. Like the Commission, the court below ignored and disregarded this, as well as other, evidence and the provisions of the applicable statutes.

E. Cases Sustaining the Supreme Court's Jurisdiction of the Appeal

United States v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co., 294 U. S. 499;

United States v. Baltimore & Ohio Railroad Company, 293 U. S. 454;

Florida v. United States, 282 U. S. 194;

Beaumont, Sour Lake & Western Railway Company v. United States, 281 U. S. 658;

Ann Arbor Railroad Company v. United States, 281 U. S. 658;

Louisville & Nashville R. R. Co. v. United States, 238 U. S. 14;

Interstate Commerce Commission v. Union Pacific Ry. Co., 222 U. S. 541;

New England Division Case, 261 U. S. 184;

Alton R. Co. v. United States, 287 U. S. 229;

United States v. Lowden, 308 U. S. 225;

Hudson & Manhattan R. Co. v. United States 313 U. S. 98;

Cornell Steamboat Company v. United States, 64 S. Ct. 768.

F. Opinion and Decree of the District Court

Appended to this statement are: (1) the *Per Curiam* decision of the District Court, dated July 28, 1944; (2) the final decree of that court, and (3) the opinion of the Interstate Commerce Commission, Division 4, of June 18, 1943, since the District Court adopted as its own findings of fact and conclusions of law, the findings and conclusions of the Commission as made in that opinion.

For the reasons stated, it is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal.

Dated September 19th, 1944.

(S.) CHARLES H. STEPPENS, JR.

First National Bank Building

Cincinnati, Ohio

(S.) ROBERT J. QUIRK,

Investment Building

Washington, D. C.

Attorneys for Appellant.

APPENDIX "A"

UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF OHIO, WESTERN DIVISION

No. 881

(Cincinnati)

THE BARRETT LINE, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE
COMMISSION, Defendants.

DECISION—Filed July 28, 1944

Before Allen, Circuit Judge, and Nevin and Druffel, District
Judges

PER CURIAM:

The Court is of opinion that the Interstate Commerce Commission did not misconstrue the applicable statute, nor misapply it, and that its action herein has been in conformity with its statutory authority.

The Order of the Commission was entered after a full and fair hearing. The Commission did not abuse its discretion, nor act arbitrarily in entering its Order. The complaint herein should be dismissed at plaintiff's costs.

The Court adopts as its own findings of fact and conclusions of law, without repetition here, the findings and conclusions of Division 4 of the Interstate Commerce Commission, as set forth in its decision June 18, 1943, in proceeding No. W-353, and the conclusion of the Interstate Commerce Commission in its order in the same proceeding entered on December 6, 1943.

Accordingly, the Court has entered an Order dismissing the complaint at plaintiff's costs.

(S.) FLORENCE E. ALLEN,

Judge, United States Circuit Court of Appeals.

(S.) ROBERT R. NEVIN,

Judge, United States District Court.

(S.) JOHN H. DRUFFEL,

Judge, United States District Court.

APPENDIX "B"

UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF OHIO, WESTERN DIVISION

No. 881

(Cincinnati)

THE BARRETT LINE, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE
COMMISSION, Defendants

ORDER

(Filed July 28, 1944. Harry F. Rabe, Clerk.)

This day this cause came on to be heard, and was submitted on the pleadings and the evidence and the Court having heard the arguments of counsel and being fully advised in the premises finds that the prayer of plaintiff's complaint should be and it is denied, and that the complaint herein should be dismissed.

It is, therefore, by the Court ordered, adjudged and decreed that the complaint herein be and hereby it is dismissed at plaintiff's costs. To all of which findings, rulings, judgment and decrees of the Court, plaintiff excepts.

(S.) FLORENCE E. ALLEN,

Judge, United States Circuit Court of Appeals.

(S.) ROBERT R. NEVIN,

Judge, United States District Court.

(S.) JOHN H. DRUFFEL,

Judge, United States District Court.

APPENDIX "C"

This report will not be printed in full in the permanent series of Interstate Commerce Commission Reports.

INTERSTATE COMMERCE COMMISSION

No. W-353

BARRETT LINE, INC., CONTRACT CARRIER APPLICATION

Submitted April 19, 1943. Decided June 18, 1943

1. Applicant found not to have been in bona fide operation on January 1, 1940, and continuously since, as a common or contract carrier by water, in the performance of transportation subject to part III of the Interstate Commerce Act.

2. New operation by applicant as a contract carrier not shown to be consistent with the public interest and the national transportation policy, and present or future public convenience and necessity not shown to require new operation by it as a common carrier. Applications denied.

Robert E. Quirk for applicant.

Jack B. Josselson, Harry C. Ames, Morris C. Pearson, W. G. Olephant, Stuart B. Bradley, Luther M. Walter, Charles Donley, John S. Mason, R. Granville Curry, Frederick M. Dolan, Andrew P. Calhoun, Wilbur LaRoc, Jr., Frederick E. Brown, and Arthur L. Winn, Jr., for interveners.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE, AND MILLER

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed by the parties. Applicant replied to protestants' exceptions and the issues were argued orally. Our conclusions differ from those recommended by the examiner.

By application filed May 19, 1941, The Barrett Line, Inc., of Cincinnati, Ohio, seeks a permit under the provisions of section 309 (f) of the Interstate Commerce Act authorizing continuance of its operation, as a contract carrier by water, in the transportation of commodities generally except certain commodities such as livestock, perishables, currency, contaminating cargo, etc., between points on the Mississippi River and its tributaries. A subsequent application, filed as a precautionary measure, seeks authority to perform the foregoing operation as a new operation. Both applications are in the alternative and request a certificate if applicant is found to be a common carrier. A hearing was held. The American Barge Line Company, Illinois River Carriers Association, Mississippi Valley Barge Line Company, and Union Barge Line Corporation oppose the granting of the applications.

On June 30, 1942, applicant had assets of \$935,123.56 which included floating equipment valued at \$633,589.94, and United States bonds in the sum of \$256,700. It had a surplus and undivided profits of \$317,450.43 and a depreciation reserve of \$370,028.54. The equipment owned at the time of the hearing, September 1, 1942, consisted of 2 towboats, 21 barges, 2 derriek boats, and 4 small coal barges. The 2 towboats are of 900 and 1200 horsepower, respectively. At the time of the hearing 2 of the barges were being used in the coal trade, 3 in the transportation of bulk petroleum products, 6 were chartered to an oil company and were being used in the transportation of bulk petroleum products, 6 were in the process of being chartered to a shipper for the transportation of bulk petroleum products, and 4 were available for such use as applicant could find for them.

Applicant, or its predecessors, has been in operation on the Mississippi River and its tributaries for about 100 years. Ordinarily it operates under term contracts which contemplate the movement of large quantities of material over a period of time. The periods covered by such contracts are not less than 2 or 3 months, and average from 4 to 6 months. Contracts are negotiated on basis of the nature and volume of the cargo offered, the time required to make delivery, the course of the waterway, the season of the year, and other factors which might affect the cost of performing the trans-

portation. Applicant has accepted single-trip shipments where special circumstances were involved but indicates that it does not intend to operate in the ordinary "run-of-the-mine" trips.

An exhibit of record contains a description of all services performed between January 1, 1936, and August 11, 1942. During this period practically all services performed were such that they may be continued without any authorization from us because they are not subject to regulation under part III of the act. Stone, in bulk, petroleum products, in bulk, and fabricated steel and steel piling were the only commodities carried. Practically all of the stone was transported for the United States Army Engineers between points in Missouri, Illinois, Kentucky, Arkansas, and Tennessee and was used for construction work on the waterways. The transportation of bulk commodities is exempt from regulation under section 303(b). There were 7 movements of petroleum products in 1937 from Baton Rouge, La., to Louisville, Ky.; 3 movements in 1941, 1 from Vicksburg, Miss., to Grand Tower, Ill., 1 from Cairo to Alton, Ill., and 1 from Wyckoff, Ky., to Nashville, Tenn.; and 8 movements in 1942 from points in Louisiana to Midland, Pa., North Bend, Ohio, and Memphis, Tenn. The transportation of petroleum, in bulk, is exempt under the provisions of section 303(b) or (d). One shipment of fabricated steel and piling was handled in 1936 from Cairo to Genoa, Wis. There has been none since. Other services rendered during the period in question consisted of towing for other carriers or for shippers of bulk commodities, chartering vessels to carriers or to shippers, salvage operations, storage of vessels belonging to others, and furnishing steam to other vessels for boiler cleaning operations. Of the foregoing the only transportation which might be subject to regulation under part III was that of chartering of vessels to shippers. However, no showing is made as to the nature of the services rendered, the commodities carried in, or the points served with such vessels. On such meager showing we would not be warranted in finding that applicant, on January 1, 1940, and continuously since, was engaged in chartering operations subject to part III of the act. In one instance a contractor's fleet of work boats was moved which

operation was probably exempt by our order of October 29, 1941, in Ex Parte 147, *Towage of Floating Objects*.¹

Applicant maintains that owing to the varying and sporadic nature of its operations it is impossible to select any limited period of its existence as representative of its business. It claims to have handled a variety of commodities in the past, such as scrap iron, pig iron, fabricated iron and steel, ties, pipe, sulphur, coal, logs, lumber, salt, grain, sand, gravel, cement, paving blocks, automobiles, and bauxite ore, and seeks authority to handle commodities generally so that it will be in a position to again handle these or similar commodities should the occasion arise.

Under the act "grandfather" rights must be predicated upon a showing of bona fide operations on January 1, 1940, and continuously since. The term "bona fide operations" has been interpreted to mean a holding out substantiated by actual operations consistent therewith. Actual operation in order to substantiate a claimed holding out on January 1, 1940, must have been within a reasonable length of time from that date. What constitutes a reasonable length of time may vary with the particular circumstances in each proceeding but one shipment made in 1936 and others at an indefinite period of time prior thereto are entirely too remote to establish bona fide operations on January 1, 1940, and continuously since. We conclude that applicant has failed to establish that it was in bona fide operation on January 1, 1940, and continuously since, in the performance of transportation subject to part III of the act.

As previously stated applicant also filed an application under the provisions of section 309(g) seeking a permit authorizing the foregoing operation as a new operation. Under that section an applicant must show that it is fit, willing, and able properly to perform the service proposed, and to conform to the provisions of part III, and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in the act.

¹ In *Towage of Floating Objects (Logs and Piling in Rafts)*, 250 I. C. C. 525, this order was vacated insofar as it applied to logs and piling in rafts.

Applicant, however, is not proposing any new operation. In fact, most of its equipment at present is being used in the transportation of bulk petroleum products. We recognize the fact that this present petroleum movement is an emergency operation occasioned by the war but even considering applicant's normal operations for a period of approximately 5 years before the war it has not shown that its operation consisted of performing other than exempt transportation, except for the one shipment of fabricated steel and piling in 1936. No evidence was submitted to show that present or future public convenience and necessity require operation by applicant in the performance of transportation subject to the act. On this record we conclude that applicant has failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity require such operation.

We find that applicant was not in bona fide operation on January 1, 1940, and continuously since, as a common or contract carrier by water, in the performance of transportation subject to the provisions of part III of the act; that it has not been shown that a new operation by applicant as a contract carrier by water would be consistent with the public interest and the national transportation policy; or that present or future public convenience and necessity require a new operation by it as a common carrier. The application, therefore, will be denied. An appropriate order will be issued.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION,
Division 4, Held at Its Office in Washington, D. C., on the
18th day of June, A. D. 1943

No. W-353

BARRETT LINE, INC., CONTRACT CARRIER APPLICATION

The Barrett Line, Inc., of Cincinnati, Ohio, having filed applications under the provisions of section 309(f) and (g) of the Interstate Commerce Act for a permit authorizing

operation by it as a contract carrier by water, a hearing having been held, and full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That said applications be, and they are hereby, denied.

It is further ordered, That this order shall take effect and be in force from and after September 13, 1943.

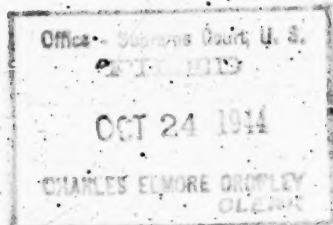
By the Commission, division 4.

W. P. BAETEL,
Secretary.

[SEAL.]

(4633)

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 630

THE BARRETT LINE, INC.,

Appellant,

vs.

**THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION AND MISSISSIPPI VAL-
LEY BARGE LINE CO., ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO**

APPELLANT'S REPLY TO MOTION TO AFFIRM

CHARLES H. STEPHENS, JR.,

ROBERT E. QUIRK,

Counsel for Appellant.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

Civil No. 881

THE BARRETT LINE, INC.,
Plaintiff-Appellant,
vs.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION,
Defendants-Appellees.

REPLY OF APPELLANT TO MOTION TO AFFIRM

Filed October 13, 1944

Preliminary Statement

The defendants, the United States of America and the Interstate Commerce Commission, have filed a motion to affirm the decree of the lower court herein entered July 28, 1944. This reply for appellant is in opposition to that motion. In that decree the court sustained an order of the Interstate Commerce Commission, Division 4, entered June 18, 1943, in the *Barrett Line Case*, 250 I. C. C. 809, and dismissed the complaint. In its *Per Curiam* decision the court below held that the Commission had not misconstrued

or misapplied the applicable statute and had not acted arbitrarily in declining to issue a permit to the appellant to operate as a contract carrier by water. However, that decision does not reveal the court's reasoning or the grounds on which its action was taken.

The Essential Facts

The appellant is a contract carrier by water, which has been operating as such on the Ohio and Mississippi Rivers and their tributaries for four generations. It seasonably filed an application with the Commission for a permit under provisions of section 309 (f), which is the so-called "grandfather" provision, and section 309 (g), which deals with applications for permits to establish new operations. These applications were consolidated and were disposed of by the Commission on one record. The permits sought by the appellant were opposed by the Mississippi Valley Barge Line Company and certain other common carriers by water who operate over the Ohio and the other rivers.

The appellant performs a towboat service and a barge service. It performs a freighting service on its own barges and a tow business on barges owned by others. In addition, it does a chartering business that contemplates the handling of both freight and the supplying of equipment to persons doing chartering, and also contemplates towing on a per diem basis.

During the period covered by the record before the Commission, appellant was engaged in chartering its vessels and in the transportation of petroleum products in bulk. However, as Exhibit 1 in the record before the Commission shows, during the years 1936 to and including August 1942, appellant engaged in 23 chartering transactions under which it leased or chartered its equipment to various shippers, none of whom are carriers subject to the Interstate

Commerce Act. During the same period, it engaged in 21 transactions under which it leased or chartered its equipment to carriers subject to the Interstate Commerce Act.

At the time of the hearing, appellant owned two tow or tug boats and 21 barges. Its barges, which are steel, were originally designed with the idea that they could be converted so as to transport liquid cargo. The testimony shows that the barges can be reconverted on comparatively short notice, so as to be fitted to transport general cargo.

A copy of appellant's tariff is attached to the bill of complaint. This tariff, which was filed with the Commission and published in the manner required by the Commission's rules and regulations governing such matter, contains the minimum charges of appellant. The tariff provides that appellant will contract to transport all commodities in barges in lots of not less than 500 net tons.

At the time of the hearing before the Interstate Commerce Commission, it was shown that the appellant's assets amounted to \$935,123.56. Of the total assets about \$280,000.00 are liquid, which means that appellant will be able when the occasion requires to change its equipment, or acquire additional equipment, to enable it to reengage in the transportation of general cargo as a contract carrier. Until the present war emergency ends, it is quite evident that it not only would be contrary to the public interest for the appellant to discontinue the transportation of gasoline and other petroleum products in its barges, but, in all probability, appellant would not be permitted to do so.

Appellant's operations are special in the highest degree. It serves customers under special contracts, and the river landings as the occasion requires. It is an irregular operator of river craft. In the experience of appellant and its predecessors there have always been elapsed periods of inactivity between the consummation of one contract or

trade and the engagement of another. There have been long periods in which one trade has practically absorbed the activities of appellant, such as, for example, its present activity in the transportation of petroleum, which is certainly a real contribution to the war emergency. The testimony before the Commission shows that appellant has handled a wide variety of commodities at various times, such as, for example, scrap iron, pig iron, fabricated steel, pipe, steel piling, sulphur, stone, petroleum products, bauxite ore and automobiles. It pioneered the movement of automobiles and many other commodities by water.

The Examiner of the Commission who heard the evidence served a report in which he recommended that a permit be granted the appellant under the provisions of section 309 (f) of the Interstate Commerce Act. Division 4, of the Commission, reversed the Examiner, and held that the appellant was not entitled to a permit either under the "grandfather" provisions of section 309 (f), or a permit to establish new operations under section 309 (g).

The Pertinent Statutory Provisions and the Decision of the Commission

Section 309 (f) of the Interstate Commerce Act provides that no person shall engage in the business of a contract carrier by water unless he holds an effective permit issued by the Commission, except that if any such carrier

"was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which the application is made, and has so operated since that time * * * the Commission shall issue such permit, without further proceedings * * * if application for such a permit is seasonably filed."

Section 302 (e) defines the term "contract carrier by water" as follows:

"The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water.'"

It will be observed that neither section 309 (f), nor section 302 (e) provides that a contract carrier by water must have been engaged in the transportation of non-exempt cargo on the "grandfather" date. In each case, the qualifying test appears to be that the carrier was engaged in bona fide operation as a contract carrier in "interstate or foreign commerce for compensation." Appellant was so engaged. It will also be observed that the Act does not regulate the business of chartering boats, as such. It provides that the furnishing of a vessel for compensation under a charter, lease, or other agreement, to a person other than a carrier subject to the Act, "when such vessels are used by the person in the transportation of its own property, shall be considered as engaging in transportation for compensation by the person furnishing the vessel within the meaning of the phrase 'contract carrier by water.'"

Section 309 (g) provides that where an application is

properly filed with the Commission for a permit to operate as a contract carrier by water.

"the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part . . . and that such operation will be consistent with the public interest and the national transportation policy declared in this Act."

That section also provides that

"the business of the carrier and the scope thereof shall be specified in such permit and there shall be attached thereto at time of issuance and from time to time thereafter such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier by water, as are necessary to carry out the requirements of this part or those lawfully established by the Commission pursuant thereto."

Section 303 (b) of the Act provides:

"Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities"

Because on or about the "grandfather" date, and since that time, the appellant has been engaged, except for its chartering transactions, in the transportation of petroleum products in bulk, which transportation is exempt under section 303 (b), the Commission concluded that appellant had failed to establish that it was in bona fide operation on January 1, 1940, and continuously since, in the performance of transportation subject to Part III of the Act. The Commission stated that the only transportation which might be subject to regulation under Part III was that of chartering vessels to shippers by appellant. As to these transactions,

the Commission said that no showing was made as to the nature of the services rendered, the commodities carried, or the points served with such vessels, and that on the showing made the Commission would not be warranted in finding that the appellant on January 1, 1940, and since, was engaged in chartering operations subject to Part III.

In dealing with the chartering transactions of appellant during the critical period, the Commission not only misconceived and misapplied section 309 (g) and section 302 (e) of the Interstate Commerce Act, but also reached a conclusion which is in direct conflict with the decision of the entire Commission of January 4, 1944, on reargument in the *C. F. Harms Company Case*, 260 I. C. C. 171. In the latter decision the Commission reversed the decision of Division 4, which had construed the applicable sections of the Act in the same manner as the Commission construed them, against appellant in the instant case. The question in the *Harms Case* as to charter transactions, as here, was whether where the owner of a vessel leases or charters a vessel to a shipper, the owner must show the nature of the service rendered, the commodities carried, and the points served with such vessels by the lessee. It is at once obvious that the owner is in no position to make such a showing as only the lessee has this knowledge. In the instant case, and in its first decision in the *Harms Case*, the Commission held that the lessor of the vessel must make such a showing before entitled to a permit. In its final decision on reargument in the *Harms Case*, 260 I. C. C. 171, the Commission reversed that conclusion and made the following cogent statement apropos of the question:

"It is conceded that the construction placed upon Section 309 (g) by the Division is proper when applied to carriers who for themselves determine the extent of their operations and the services they will render or the scope thereof." Applicant argues that the

rights of a carrier under the 'grandfather' clause of the statute must be determined by what it does in bona fide operation, and that such rights are not enlarged or otherwise affected by what others, independent of the carrier, may or may not do. That construction and application of the statute assures the carriers a certificate or permit to continue its operations as maintained on the statutory date and continuously since. Applicant on January 1, 1940, and continuously since, has held itself out to hire its vessels to anyone for any use for which they were suited without limitation as to the commodities to be transported or the place or places to which they were to be moved. It claims, therefore, that the permit to which it is entitled under the so-called 'grandfather' clause of the statute would permit it to continue the carrier business in which it was engaged on and since the statutory date. It further claims that the limiting of its permit to defined territory base upon the use to which the hirer of its vessels used them on and since the statutory date restricts its business materially and prevents it from continuing the operations in which it was engaged and in which it continuously has been engaged. We conclude that the claims of applicant are well grounded. The territorial limitations imposed by the permit issued April 14, 1943, are not warranted and should be removed."

The final decision of the Commission in the *Harms Case* on reconsideration is in accordance with the letter and the spirit of the applicable statute. The decision here assailed is otherwise. It should be kept in mind that under section 302 (c) of the Interstate Commerce Act chartering transactions constitute as to the vessels leased or chartered "engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'." It will thus be seen that as the appellant engaged in 23 chartering transactions under which it leased or chartered its vessels to various shippers, none of whom are carriers, before, on and

after the "grandfather" date, January 1, 1940, it must be held to have been engaged in transportation for compensation as a contract carrier by water, and as such it is entitled to a permit from the Commission under section 309 (f).

So much for the chartering transactions. As to its freighting service, namely the transportation of freight on its own barges, the appellant, as heretofore stated, was engaged principally in the transportation of petroleum products in bulk. This character of transportation, standing alone, is exempt from the provisions of Part III of the Interstate Commerce Act by virtue of section 303 (b) of that part. Thus during the critical period the appellant was engaged in exempt and non-exempt transportation. In the *Russell Bros. Towing Case*, 250 I. C. C. 429, Russell Bros. were engaged in both exempt and non-exempt transportation during the critical period. In that case, after referring to the fact that neither section 309 (f), the "grandfather" clause, or section 302 (e), the definitive clause, contain any reference as to whether the transportation performed by the carrier is or is not subject to regulation, the Commission said:

"In determining a carrier's status and the scope of its operations during the 'grandfather' period its entire operation should be considered, and not merely that part which the Congress has seen fit to make subject to regulation. To find that 'grandfather' rights may be granted only to the extent that a showing is made as to the performance of regulated transportation requires the reading into the law of language which, in fact, is not there.

"This matter is particularly important in instances like the present where an applicant is seeking a certificate covering all commodities, or general cargo. *Obviously no carrier actually transports all commodities and therefore the bona fides of an applicant's operations depends on the representative character of the transportation performed.* It may well be that the car-

rier holds itself out to, and actually does, transport all traffic offered to it from and to all points covered by its application but that the great bulk of such transportation is exempt from regulation. It seems clear that if we shut our eyes to all of applicant's transportation except that which is subject to regulation we get an incomplete and distorted picture of the nature and extent of its operations. To place limitations upon 'grandfather' rights, predicated upon that view would be unjust and unreasonable, and is not contemplated by the law."

In the decision of the entire Commission of July 26, 1944, Docket W-12, in the *Moran Towing and Transportation Company case*, not yet reported, the Commission authorized the issuance of a certificate to Moran, who was engaged in towing service, even though all of such towing services performed during the critical period were exempt under the provisions of the Interstate Commerce Act. In that case the Commission said that if it should deny the certificate sought, the applicant would no longer be able to hold itself out to perform an unlimited general towing service to the public, but would be required to confine its services to exempted operations. That is precisely the effect of the decision of the Commission in the instant case in denying appellant a permit. Under the decision assailed here the appellant would have to incur the expense and suffer the delay incident to obtaining a permit from the Commission in every instance where a new transaction involved non-exempt transportation. It is impossible for any water carrier to operate under such conditions, unless it elects to limit its operations to exempt operations.

In their motion to affirm the appellees point out that section 309 (g) requires the Commission in granting a permit to a contract carrier to specify in the permit the business of the carrier and the scope thereof, and they refer

to the decision of this Court in *Noble v. United States*, 319 U. S. 88, 92 as supporting the position taken by them. In that case the Commission limited the business of the motor carrier to the types of shippers it had done business with on the critical date, under the provisions of section 209, which in the respects here pertinent, are the same as the provisions of section 309 (g). There, Noble argued that, once the territory he may serve and the commodities he may haul have been determined, he should be allowed to haul these commodities for anyone he chooses within such territory limits. As on the critical date, Noble had exclusively served food canneries or meat packing houses, the court held that to grant the rights sought would make a basic alteration in the characteristics of the enterprise of the contract carrier; and that in such circumstances the "grandfather" clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the system beyond the pattern which it had acquired on the "grandfather" date. In the instant case, the appellant has not sought a permit from the Commission which would make a basic alteration in its characteristics. On the contrary, the permit sought would merely authorize appellant to continue to perform the character of transportation transactions it and its predecessors have performed for four generations. The facts here are more analogous to the facts in the *Lee Wilson and Company Case*, 29 M. C. C. 525, where the Commission authorized the contract carrier to transport commodities generally.

It is clear that in denying the appellant a permit under the "grandfather" provisions of section 309 (f) the Commission acted arbitrarily and misconceived and misapplied the law.

We shall now deal with the action of the Commission in denying appellant a permit to establish future operations.

as a contract carrier by water. As already stated, the examiner properly concluded that appellant was entitled to such a permit. Division 4 reversed the examiner in this respect. The examiner's views on this question are summed up in the following paragraphs from his report and conclusion:

"In determining these various matters it is appropriate to take a much broader view of the situation than in connection with the determination of 'grandfather' rights. Where applicant is and has been engaged in business similar to that for which the permit is sought, consideration may and should be given to its historical background, to the character of service rendered with respect to both regulated and unregulated traffic, and to the territory served, during whatever period information is available with respect to such matters.

"The nature and extent of applicant's operations at present, and extending back over a long period of years, coupled with the evidence of record showing that it desires to continue such operations and has sufficient facilities and financial resources to do so, warrant the conclusion that applicant is fit, willing, and able to perform the service proposed."

In dealing with this phase of the case, Division 4 concluded, *inter alia*,

"On this record we conclude that applicant has failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity requires such operation."

Division 4 also called attention to the fact that most of appellant's equipment is being used in the transportation of bulk petroleum products. Although the Commission recognized that the present petroleum movement is an emer-

gency operation occasioned by the war, that considering appellant's normal operations for a period of approximately five years before the war does not demonstrate that its operation consisted of other than performing exempt transportation. In this respect the Commission committed two errors. It failed to take into account that during the years from 1936 to and including August, 1942, to the date of the hearing, the appellant made 21 chartering transactions, which are non-exempt transactions and within the provisions of the Interstate Commerce Act. It also arbitrarily disregarded and gave no probative weight to the oral testimony of O. Slack Barrett, president of the appellant, which is to the effect that the appellant is fit, willing, and able, before or at the end of the existing war emergency, to engage in the kind of general cargo transportation transactions which it has performed for a long period of time. Under section 309 (g) it is the duty of the Commission to issue a permit to water carrier applicant if it finds that the applicant is fit, willing, and able properly to perform the service proposed

"and that such operation will be consistent with the public interest and the national transportation policy declared in this Act."

In the *Scott Bros. Case*, 2 M. C. C. 155, 164, the Commission had occasion to construe and apply a similar phrase used in section 209 (b) of Part II. "The Commission said, after considering the various decisions which threw light on that question:

"It follows from this use that its true meaning is that of 'not contradictory or hostile to the public interest.' Such decisions as we have been able to find, support this interpretation of the phrase."

It requires a strained and unreasonable interpretation of the law to justify the conclusion of the Commission that the continued operation of a water carrier, which has used the Ohio and Mississippi Rivers and their tributaries for four generations, in chartering and other transportation transactions, could or would be hostile to the public interest or, otherwise expressed, would not be consistent with the public interest and the national transportation policy. The examiner properly gave weight to these facts: Division 4 disregarded them. In numerous decisions the Commission has held that the operation of a water carrier for a long period of time is practically conclusive evidence of the fact that its continued operation is required by the present and future public convenience and necessity. It has held that if it should decide otherwise it would not be following the direction of the national transportation policy of the Act to preserve a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense. *John L. Goss Corp.*, 250 I. C. C. 101, 103; *Chocotaw Transportation Co.*, 250 I. C. C. 106, 107; *Reidville Oil & Guano Co.*, 250 I. C. C. 71, 73.

In the *John L. Goss Corp. Case*, the Commission said apropos of this question:

"Applicant's operation as a water carrier for fifty years is evidence of the fact that continuation of the operation is required by present and future public convenience and necessity. If we were to decide otherwise, we would not be following the direction of the national transportation policy of the act to preserve a national transportation system adequate to meet the needs of the commerce of the United States and of national defense."

In refusing to grant appellant a permit to establish new operations, the Commission acted arbitrarily and unreason-

ably and, to use its own language, in doing so it failed to follow the direction of the national transportation policy. It also misconceived and misapplied section 309 (g) in denying appellant such a permit.

Conclusion

The effect of the Commission's decision, if sustained, will be to cause appellant irreparable injury. Without a permit to continue to handle general cargo and to engage in chartering transactions appellant will not be in a position to make contracts of that character until and unless, in each instance, it files an appropriate application with the Commission and obtains a permit. This involves expense and delays. This decision denies to appellant the right to continue to perform the character of service it and its predecessors have performed for 100 years.

It cannot be assumed that in enacting Part III of the Interstate Commerce Act, Congress meant to destroy a water carrier of this type. On the contrary, one of the principal purposes of that Act is to encourage, foster, develop, and promote transportation by water in all of its forms. The hearing before the committees of Congress were extensive. Congress knew that water carrier transportation had been conducted under a variety of special and unusual circumstances unknown to transportation by rail and by highway. The decision of the Commission here assailed will defeat these purposes. The effect of that decision will be to place in a preferred position the Mississippi Valley Barge Line and other large common carriers by water, since they will be able to handle both exempt and non-exempt traffic to the extent their equipment will permit, while carriers such as the appellant will be restricted to the transportation of exempt traffic.

The question herè presented is one of substance. The motion to affirm should be denied.

Respectfully submitted,

CHARLES H. STEPHENS, JR.,
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(S.) ROBERT E. QUIRK,
1116 Investment Building,
Washington, D. C.,
Attorneys for the Appellant.

Certificate of Service

I hereby certify that I have served a copy of this reply to the motion to affirm upon counsel of record on this 11th day of October, 1944, by mailing them a copy thereof.

(S.) ROBERT E. QUIRK.

(4634)

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 630.

THE BARRETT LINE, INC., *Appellant*,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, *Appellees*.

On Appeal from the District Court of the United States for
the Southern District of Ohio.

BRIEF FOR THE BARRETT LINE, INC., APPELLANT.

ROBERT E. QUIRK,
Counsel for Appellant.

March, 1945.

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OPINION BELOW

No opinion was written by the District Court. It filed its *per curiam* decision July 28, 1944, (R. 28-29) in which the court adopted as its own findings of fact and conclusions of law the findings and conclusions of the Interstate Commerce Commission, Division 4, (R. 8-13) which are reported in 250 I. C. C. 809.

JURISDICTION.

The final decree of the three-judge district court was entered on July 28, 1944 (R. 29). Petition for appeal was presented and allowed on September 15, 1944 (R. 30-33). The jurisdiction of this court is conferred by section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U. S. C. A. 47a), and section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345). This court entered its order noting probable jurisdiction December 4, 1944 (R. 149).

QUESTIONS PRESENTED.

1. Whether the Interstate Commerce Commission in denying the application of appellant for a permit to continue to operate as a contract carrier by water misconceived and misapplied the provisions of the "grandfather" clause of section 309(f) of Part III of the Interstate Commerce Act and acted arbitrarily and capriciously in so doing.

2. Whether the Commission committed an error of law and acted arbitrarily in concluding that the appellant was not on the "grandfather" date, January 1, 1940, or within a reasonable period prior thereto, and is not at the present time a contract carrier by water subject to the provisions of Part III of the Interstate Commerce Act. This requires a consideration of sections 302(e), 303(b) and 309(f) of that Act.

3. Whether the action of the Commission in concluding that the appellant is not entitled to a permit to establish a new or future operations under the provisions of section 309(g) of Part III of the Interstate Commerce Act was unreasonable, arbitrary and capricious.

4. Whether the District Court erred in sustaining the order of the Commission in respect to the applications of the appellant for permits under sections 309(f) and 309(g) of the Interstate Commerce Act.

STATUTES INVOLVED.

The statutes involved are sections 302(e), 303(b), 309(f) and 309(g) of the Interstate Commerce Act. The pertinent provisions are set forth in the appendix.

STATEMENT.

The appellant is a contract carrier by water. It was incorporated in the State of Ohio in 1926. It is the successor of Oscar F. Barrett, who in turn was the successor of other members of the Barrett family, who have conducted water carrier operations on the Ohio and the Mississippi Rivers and their tributaries for approximately 100 years. Cincinnati Ohio is the port of registration of appellant and Cairo, Illinois is the situs of its fleet and the port to and from which its equipment is operated. The appellant is what is known in the river trade as an irregular operator which performs special and sporadic services under special contracts and conditions. The principal commodities handled by appellant in recent years consist of scrap iron, pig iron, fabricated steel, pipe, steel piling, sulphur, stone, and petroleum products. The appellant has from time to time handled other commodities under special contracts. Its operations fluctuate widely both as to volume, the territory served, and the character of the commodities handled. It pioneered the transportation by water of automobiles, of bauxite ore, and of petroleum. Generally speaking, the operations of appellant are confined to a comparatively few contracts at particular times.

The appellant performs two types of freight services, namely, tow boat service and barge service. It performs a freighting business with its own barges and power and a tow business with respect to barges owned by others. In addition, it does a substantial chartering business that contemplates the handling of both freight and the leasing or chartering of its equipment to others. Except for its chartering transactions, which by section 302(e) of the

Act constitute the engaging in transportation as a contract carrier by water, the freighting business of the appellant has been confined exclusively to the transportation of petroleum products in bulk since the "grandfather" period. During the years 1936 to and including September, 1942, when the Commission heard the evidence, appellant engaged in 43 chartering transactions, in 23 of which it leased or chartered its equipment to various shippers, none of whom are carriers subject to the Interstate Commerce Act (R. 117-126).

Appellant has published and filed with the Commission its schedule of minimum rates and charges, which includes its rules, regulations, and practices which govern the assessment of the charges and the conditions under which its services will be performed (R. 130-144). In general, the commodities handled by appellant consist of materials which may be subjected to exposure to weather without damage, bulk goods for example, and which move under special contracts for fixed periods with minimum quantities. The appellant will not accept less than barge load quantities of 500 tons. Its rates for transportation are based upon what is characterized as "free on" and "free off" service. These terms mean that the shipper loads and the consignee unloads the barge at their expense. Appellant does not own or operate any terminals or terminal facilities. It issues no bills of lading or other billing. It simply makes an invoice to its customers. It maintains no solicitors. When appellant is negotiating a contract with a prospective customer competition with other carriers does not enter the picture. In negotiating contracts with prospective customers a large number of factors are considered, such as, for example, the seasons of the year, the course of the river over which the transportation is to be performed, the time of unloading and loading, and other factors which affect the ability of the appellant to perform the service required and of the other party to the contract to meet the conditions under which the appellant operates.

The length of the contracts average from four to six months, and are never less than from two to three months. The appellant does not handle spot movements of freight.

On January 1, 1940, appellant owned three steam stern-wheeled tow boats and 25 barges. It also owned two derrick boats and four fuel barges, called fuel flats. In river language a barge is a vessel that is non-self propelled and is usually unmanned. It carries the freight or cargo. The tow boat is the power unit that furnishes the motive, and pushes the barges up and down the river. Tow boats owned by appellants are used to tow its own barges as well as barges owned by others, including common carriers. The tow boats of appellant have been and are at times used to tow loaded and empty barges for other carriers, as well as for shippers. At the time of the hearing, September 1942, the appellant owned two tow boats and 21 barges. It was using three documented gasoline barges to haul petroleum traffic in bulk. It has six barges under charter to the Standard Oil Company of Ohio, which are used in the movement of crude oil in bulk. It has six other barges under charter. Two barges are in the fuel trade and four barges are ready for such service as may be necessary to meet the demands. Appellant's barges are made of steel and were designed originally with the idea that they could be converted to carry liquid cargo, but at the time they were built the necessary piping and fitting to carry oil were not installed. These fittings were later attached to the barges which are now used in the transportation of petroleum products. Witness Barrett, who is president of the appellant, testified that when the present movement of petroleum ceases the barges used in such transportation could be quickly reconverted for the handling of general cargo. The Office of Defense Transportation and the Petroleum Administrator have encouraged the appellant to continue to use its barges in the transportation of petroleum products.

Exhibit 1 of record before the Interstate Commerce Commission, reproduced at pages 117-126 of the printed record shows the rivers and ports served, as well as the commodities handled and the other services performed by the appellant during the year 1936 to the time of the hearing. This exhibit also shows the number of chartering transactions of the appellant during that period.

The financial condition of the appellant is shown by exhibit 2 of the record before the Commission (R. 27). This exhibit consists of a balance sheet of the appellant as of June 30, 1942. The appellant's assets amounted to \$935,123.56 as of that date; of the total assets about \$280,000 are liquid.

Item 25 of appellant's tariff I. C. C. No. 1 (R. 136) provides charges on "all commodities in barges" between all ports served by appellant. This item was included in the tariff in this form to avoid the necessity on the part of the appellant of publishing minimum rates on each and every commodity that it might contract to haul. Witness Barrett testified that while neither the appellant nor its predecessors had ever handled a wide variety or a large number of commodities in particular barges or during particular periods, appellant always has been ready and willing to make contracts to handle almost any commodity, principally of bulk characteristics, which the appellant was in position to transport at a given time, if the customer could meet the conditions under which the appellant operates. The appellant pioneered the movement of many commodities by barges which it has not had occasion to handle in recent years, but which in the course of time it may again contract to handle. In general, appellant has not handled the conventional type of merchandise. Its contracts of carriage have dealt chiefly with bulk materials which are not damaged by exposure to weather.

PROCEEDINGS BEFORE THE COMMISSION.

Appellant seasonably filed an application with the Commission in the manner and form prescribed by the rules of the Commission for a permit to continue to operate as a contract carrier by water under the so-called "grandfather" provisions of section 309(f) of the Interstate Commerce Act. Subsequently it filed another application which seeks authority under section 309(g) to establish future operations on the ground that such operations would be consistent with the public interest and the National Transportation Policy. The latter application was filed at the suggestion of a representative of the Commission and out of abundance of caution. The applications were consolidated and were heard before an examiner of the Commission at Cincinnati September 1, 1942. At that hearing the Union Barge Line Corporation, Mississippi Valley Barge Line Company, Campbell Transportation Company, American Barge Line Company, each of which is a common carrier operating on the Ohio and Mississippi Rivers and their tributaries intervened and opposed the permits sought by the appellant. The Illinois River Carriers Association also intervened and opposed the appellant.

The report and recommendation of the examiner was served upon the parties. The examiner found that the appellant is not entitled to a permit under the so-called "grandfather" provisions of section 309(f), but is entitled to a permit under what he characterized as the broader provisions of section 309(g). In this connection the examiner said, *inter alia*,

"The nature and extent of applicant's operations at present, and extending back over a long period of years, coupled with the evidence of record showing that it desires to continue such operations and has sufficient facilities and financial resources to do so, warrant the conclusion that applicant is fit, willing, and able to perform the service proposed."

By its decision of June 18, 1943 (R. 8-13) the Commission, Division 4, reversed the examiner and held (a) that the only transportation by appellant which might be subject to Part III of the Act consisted of chartering vessels of shippers, but that as no showing was made as to the nature of the services rendered, the commodities carried in, or the points served with, such vessels the Commission would not be warranted in finding that the appellant on January 1, 1940, and since, was engaged in chartering operations subject to Part III of the Act; (b) that the appellant had failed to establish that it was in bona fide operation on January 1, 1940, and continuously since, in the performance of transportation subject to Part III of the Act, and (c) while the Commission recognized that the present petroleum movement of the appellant is an emergency operation occasioned by the war, that considering appellant's normal operations for a period of approximately five years before the war it has not shown that its operation consisted of performing other than exempt transportation, and that no evidence was submitted to show that the future public convenience and necessity requires the operation of appellant, on which premise it concluded that appellant has failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the National Transportation Policy (R. 11-12).

On or about August 25, 1943, the appellant filed a petition for reconsideration by an oral argument before the entire Commission. By its order of December 6, 1943, the Commission denied that petition (R. 14-23).

SUMMARY OF ARGUMENT.

I.

The evidence of record establishes that the appellant was engaged in transporting property in interstate commerce as a contract carrier by water prior, on and since the "grandfather" date, January 1, 1940. Under the provisions of section 309(f) of the act no person shall engage in the business of a contract carrier by water unless he holds an effective permit issued by the Commission, except that if such a carrier was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which the application is made and has so operated since that time, the Commission shall issue such a permit without further proceedings. This section of the act does not require in terms that to be entitled to "grandfather" rights the water carrier must have been engaged in the transportation of commodities which would make the carrier subject to the provisions of the Act.

Section 302(c) defines the term "contract carrier by water" to mean "any person which under individual contracts or agreements, engages in the transportation * * * by water of passengers or property in interstate or foreign commerce for compensation." The appellant was so engaged prior, on and since the "grandfather" date. The test of inclusion under this section is the engagement of a contract carrier by water of passengers or property "in interstate or foreign commerce for compensation." While in its strictly transportation or freighting business the appellant was engaged in the transportation of petroleum products in bulk, which, as such, is excluded from the provisions of the Act by section 303(b), the appellant was nevertheless engaged in transportation subject to the act on and since the "grandfather" date by virtue of the fact that it made 23 chartering transactions under which it leased or chartered its vessels to various shippers, none

of whom are carriers subject to the Interstate Commerce Act. Under the provisions of section 302(e) such an engagement is defined to constitute "as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'."

Because no showing was made as to the nature of the services rendered, the commodities carried in, or the points served with such vessels by the lessees, the Commission held that the chartering transactions did not constitute the engagement in transportation by the appellant as a contract carrier by water. In this finding the Commission clearly misconceived and misapplied the statute. Moreover, its decision is directly contrary to and inconsistent with the subsequent decision of the entire Commission of January 4, 1944, in the *C. F. Harms Company Case*, 260 I. C. C. 171. In the latter case the Commission held that where vessels are chartered or leased to shippers it is not necessary for the applicant to show the nature of the services rendered, the commodities carried in, or the points served with the leased vessels. This is sound since it is obvious that the lessor is not in position to make such a showing as only the lessee has such knowledge. Under section 302(e) the act of chartering or leasing vessels to a shipper which is not a carrier constitutes, without more, the engagement in transportation by water as a contract carrier. The *Harms case* also accords with the decisions of the Commission in the *Russell Bros. Towing Case*, 250 I. C. C. 429, and the *Moran Towing and Transportation Company Case*, 260 I. C. C. 269, and is not contrary to the decision of this court in *Noble v. United States*, 319 U. S. 88, 92, relied on by the appellees.

II.

In disposing of the application of the appellant for authority to establish future operations and to make future contracts as a contract carrier by water, the Commission

erred and acted arbitrarily in finding that appellant had not shown that its operations consisted of performing other than exempt transportation, except for the shipment of fabricated steel piling made in 1936, and had not shown that the present or future public convenience and necessity requires operation by appellant in the performance of transportation subject to the Act (R. 12). It also erred in concluding that the appellant has failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the National Transportation Policy, or that present or future public convenience and necessity requires such operation (R. 12). A contract carrier, as distinguished from a common carrier, is not required to show that the present and future public convenience and necessity requires the proposed operation. A contract carrier is only required to show that the proposed operation will be "consistent with the public interest and the National Transportation Policy." In the *Scott Bros. Case*, 2 M. C. C. 155, 164, in construing the meaning of the phrase "consistent with the public interest", the Commission held that it meant "not contradictory or hostile to the public interest." The evidence shows that the appellant has been engaged as a contract carrier in chartering vessels and in transportation of various commodities under special contracts for a long period of time. The Commission has heretofore repeatedly held that evidence of this character establishes that the continuation of such an operation is required by present and future public convenience; and that if it were to decide otherwise the commission would not be following the direction of the National Transportation Policy of the Act to preserve a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense. *John L. Goss Corp.*, 250 I. C. C. 101, 103; *Choctaw Transportation Co.*, 250 I. C. C. 106, 107, and *Reidville Oil and Guano Co.*, 250 I. C. C. 71, 73.

The decision of the Commission, if sustained, will cause appellant irreparable injury. Without a permit to continue to handle general cargo and to engage in chartering transactions appellant will not be in position to make special contracts of that character until and unless in each instance it files an application with the Commission and obtains a permit. This involves expense and delays and is wholly impracticable. The decision of the Commission denies to the appellant the right to continue to perform the character of transportation it and its predecessors have performed on the Ohio and Mississippi Rivers, etc., for 100 years. It cannot be assumed that in enacting Part III of the Interstate Commerce Act Congress meant to obstruct or destroy the development of water carriers of the type of the appellant. Congress knew that water transportation had been conducted under a variety of special and unusual circumstances unknown to transportation by rail and by highway. The effect of the decision will be to place in a preferred position the large common carriers by water which operate on the Ohio and Mississippi Rivers since they will be able to handle both exempt and non-exempt traffic to the extent their equipment will permit, while carriers such as the appellant will be restricted to the transportation of exempt traffic.

ARGUMENT.

I.

Appellant is Entitled to a Permit Under the "Grandfather" Provisions of the Act.

In concluding that the appellant is not entitled to a permit under the so-called "grandfather" provisions of section 309(f), the Commission acted arbitrarily and misconceived the law. In addition it failed to give effect to the spirit as well as the letter of the Water Carrier Act and the National Transportation Policy. We have already shown that the appellant performs a highly

specialized service. It is characteristic of such a carrier that its service under special contracts will be devoted to the transportation of particular commodities, or of one commodity, depending on the volume, during particular contract periods, to the exclusion of other commodities. The Commission failed to give effect to this characteristic in reaching its conclusion. The record before the Commission shows that during a long period of time the appellant had engaged in transportation of various commodities under special contracts and that many of these transactions would be subject to the provisions of the Act. It is true that, except for its chartering transactions which will be presently dealt with, for several years prior and since the "grandfather" date the appellant has been engaged in handling bulk commodities. On that account the Commission concluded that the appellant had failed to establish that it was in bona fide operation on the "grandfather" date, or within a reasonable period prior thereto, in the performance of transportation subject to Part III of the Act.

While inconsistency is not a ground for setting aside an order of the Commission, it does tend to establish arbitrariness. The Commission's decision in the instant case is inconsistent with the broad application of the Act given by it in other cases. Neither the "grandfather" provisions of section 309(f) nor the provisions of section 302(e), which define a contract carrier by water, require as a condition precedent to a permit that such a carrier must show that on or about the "grandfather" date and thereafter it was engaged in the transportation of non-exempt commodities. In the *Russell Bros. Case*, 250 I. C. C. 429, and in the *Moran Towing and Transportation Company Case*, 260 I. C. C. 269, the Commission issued permits to the applicants irrespective of the fact that they were engaged in exempt transportation. A certificate was issued to Moran, although engaged in towing service, all of which was exempt from the provisions of section 303(b) of the Act.

In its first decision in the *Moran Case*, 250 I. C. C. 541, which was sustained upon reconsideration in 260 I. C. C. 269, the Commission said:

" * * * If we were to deny the application, applicant would no longer be able to hold out an unlimited general towage service to the public, but would be required to confine its services to exempted operations. Such limitation would require that applicant circumspectly examine every tender of business in order to determine whether or not the transportation would be exempted, and would deprive the public of the unlimited services which have been available."

In this statement the Commission properly construed the Act in the light of its purpose and of the peculiarities and special conditions under which water transportation is carried on. The principle there applied is equally applicable to the conditions under which the appellant operates; since it is clear that the action of the Commission in denying a permit to the appellant will require it to confine its services to exempted operations, merely because of the circumstance that under the emergency conditions which have existed for several years, the freighting business of the appellant has been confined to the transportation of petroleum in bulk. In the *Russell Bros. Case*, 250 I. C. C. at page 433, after referring to the "grandfather" clause of the Act which requires a showing of bona fide operation on and after the "grandfather" date, the Commission said:

"It will be noted that in neither instance is there any reference to whether the transportation performed by the carrier is or is not subject to regulation. In determining a carrier's status and the scope of its operations during the 'grandfather' period, its entire operation should be considered, and not merely that part which the Congress has seen fit to make subject to regulation. To find that 'grandfather' rights may be granted only to the extent that a showing is made as to the performance of regulated transportation requires the reading into the law of language which, in fact, is not there."

"This matter is particularly important in instances like the present where an applicant is seeking a certificate covering all commodities or general cargo. Obviously no carrier actually transports all commodities, and therefore the bona fides of an applicant's operations depend on the representative character of the transportation performed. It may well be that the carrier holds itself out to, and actually does, transport all traffic offered to it from and to all points covered by its application but that the great bulk of such transportation is exempt from regulation. It seems clear that if we shut our eyes to all of applicant's transportation except that which is subject to regulation, we get an incomplete and distorted picture of the nature and extent of its operations. To place limitations upon 'grandfather' rights predicated upon that view would be unjust and unreasonable, and is not contemplated by the law."

In the *Pope & Talbot Case*, 250 I. C. C. 117; *Schafer Bros. Case*, 250 I. C. C. 353, and the *McLain Carolina Case*, 250 I. C. C. 327, the Commission construed and applied the "grandfather" provisions of the Act in the same broad manner. In the *Schafer Bros. Case* it very properly considered proof of operations more than three years prior to the "grandfather" date to establish "grandfather" rights of the applicant, and in the *McLain Carolina Case*, at page 332, the Commission made the following significant statement with respect to the "grandfather" provisions of the Act:

"There is no requirement under the 'grandfather' provisions of the act that an actual movement of specific commodities must be shown, or that the movement of traffic on a route between two ports must be constant. It is well known that much of the traffic transported over water routes moves spasmodically and that some business is nonrecurring in nature."

The operation of appellant with respect to contracts and particular commodities is special and spasmodic in a very high degree, a characteristic recognized by the Commission

in the *McLain* and other cases cited, but as to which it refused to give effect in the instant case.

We have already shown that under the provisions of section 302 (e) the leasing or chartering of vessels by the owner "to a person other than a carrier subject to this Act" shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of "contract carrier by water." On and since the "grandfather" date the appellant engaged in 23 chartering transactions under which it leased or chartered its vessels to various shippers, none of whom are carriers subject to the Interstate Commerce Act. Under the provisions of section 302 (e) these transactions establish that the appellant was engaged in transportation for compensation as a contract carrier by water. But, as we have already pointed out, the Commission refused to so regard the transactions because, as it said (R. 11), there is no showing as to the nature of the services rendered, the commodities carried in, or the points served with such vessels. No such showing was made by the appellant for the very obvious reason, first, that it is not required by the act and, second, such information is not within the reach or the knowledge of the appellant as lessor. In this view of the law the Commission followed the precedent established in its original decision in the *C. E. Harms Company Case*, 250 I. C. C. 513, which was made about eight months before the decision in the instant case.

The *Harms Case* was reopened and reconsidered by the Commission. In its decision of January 4, 1944, on reconsideration, 260 I. C. C. 171, it reversed the previous decision which had construed the applicable sections of the Act in the same manner as the Commission construed them against appellant here. The question in the *Harms Case* as to charter transactions, as here, is whether where the owner of a vessel leases or charters the vessel to a shipper, the owner must show the nature of the service ren-

dered, the commodities carried, and the ports served with such vessel by the lessee. In the instant case and in the first decision in the *Harms Case* the Commission held that the lessor must make such a showing to be entitled to a permit under the "grandfather" provision of the Act. In reversing the original decision in the *Harms Case*, 260 I. C. C. 171, 172, the Commission made the following appropriate and cogent statement of the law:

"It is conceded that the construction placed upon Section 309 (g) by the Division is proper when applied to carriers who for themselves determine the extent of their operations and the services they will render or the 'scope thereof.' Applicant argues that the rights of a carrier under the 'grandfather' clause of the statute must be determined by what it does in bona fide operation, and that such rights are not enlarged or otherwise affected by what others, independent of the carrier, may or may not do. That construction and application of the statute assures the carriers a certificate or permit to continue its operations as maintained on the statutory date and continuously since. Applicant on January 1, 1940, and continuously since, has held itself out to hire its vessels to anyone for any use for which they were suited without limitation as to the commodities to be transported or the place or places to which they were to be moved. It claims, therefore, that the permit to which it is entitled under the so-called 'grandfather' clause of the statute would permit it to continue the carrier business in which it was engaged on and since the statutory date. It further claims that the limiting of its permit to defined territory based upon the use to which the hirer of its vessels used them on and since the statutory date restricts its business materially and prevents it from continuing the operations in which it was engaged and in which it continuously has been engaged. We conclude that the claims of applicant are well grounded. The territorial limitations imposed by the permit issued April 14, 1943, are not warranted and should be removed."

The final decision of the Commission in the *Harms Case* on reconsideration is in accordance with the letter and the spirit of the applicable statutes. The decision in the instant case is contrary to the letter and the spirit of the statute. It should be kept in mind that under section 302 (e) of the Interstate Commerce Act chartering transactions constitute, as to the vessels leased or chartered, "engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of contract carrier by water." It will thus be seen that as the appellant engaged in 23 chartering transactions under which it leased or chartered its vessels to various shippers, none of whom are carriers before, on, and continuously since the "grandfather" date, it must be held to have been engaged in bona fide operation as a contract carrier by water during the critical period and is therefore entitled to a permit from the Commission under section 309 (f) of the Interstate Commerce Act.

Among other decisions the appellees have cited the decision of this court in *Noble v. United States*, 319 U. S. 88, as supporting the proposition that because during the critical period the transportation services of the appellant were confined to petroleum products in bulk, it is not entitled to a permit. This contention overlooks entirely the fact that during the critical period the appellant was engaged in transportation as a contract carrier by water at least, as the term is defined in section 302 (e), by virtue of its chartering transactions. In the *Noble Case* the Commission limited the business of the motor carrier there involved to the types of shippers it had done business with on the critical date. The provisions of section 209 there interpreted are in the respects here pertinent the same as the provisions of section 309 (g). That section authorizes the Commission in granting a permit to a contract carrier to specify in the permit the business of the carrier and the scope thereof.

Noble argued that once the territory he may serve and the commodities he may haul have been determined he should be allowed to transport these commodities for anyone he chooses to serve within such territorial limits. On the critical date Noble had exclusively served food canneries or meat packing houses. The court held that to grant the rights sought by Noble would make a basic alteration in the characteristics of the enterprise of the contract carrier, and that in such circumstances the "grandfather" clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the system beyond the pattern which the carrier had acquired on the "grandfather" date. In the instant case the appellant did not seek a permit from the Commission which would make a basic or other alteration in its characteristics. On the contrary, the permit sought merely authorized the appellant to continue to perform the character of transportation transactions it and its predecessors have performed for four generations. The facts here are more analogous to the facts in the *Lee Wilson & Co. Case*, 29 M. C. C. 525, where the Commission authorized the contract carrier there involved to transport commodities generally, and overruled the contention made that the permit should be restricted to particular commodities. In the *Wilson Case* the Commission said that "The variety of commodities which applicant will be called upon to carry makes it impractical to attempt to narrow this service to a particular class or classes of commodities."

For the reasons stated it is clear that in denying the appellant a permit under the "grandfather" provisions of section 309 (f) the Commission acted arbitrarily and unreasonably and misconceived and misapplied the applicable statutes.

II.

Appellant is Entitled to a Permit to Establish Future Operations and to Make New Contracts Under the Provisions of Section 309 (g) of the Act.

Under the provisions of section 309 (g) a contract carrier by water is entitled to a permit if it files an appropriate application with the Commission, and if the Commission finds "that the applicant is fit; willing, and able properly to perform the service proposed and to conform to the provisions of this part * * * and that such operations will be consistent with the public interest and the National Transportation Policy declared in this Act." The examiner who heard the evidence properly held that the Commission may appropriately take a broader view with respect to an application for future operation than it is permitted to take in determining the rights of a water carrier under the "grandfather" clause. He said that where, as here, the applicant is and has been engaged in business similar to that which the permit is sought, consideration may and should be given to its historical background, to the character of the service rendered with respect to both regulated and unregulated traffic, and to the territory served during whatever period information is available in connection with such matters. He concluded that with these considerations in mind, together with the financial standing of the applicant, that the Commission should find that it is fit, willing and able to perform the service proposed, and that such service will be consistent with the public interest and the National Transportation Policy. The Commission, Division 4, reversed the examiner. It held that the appellant did not, in fact, propose any new operation and had failed to show that a new operation by appellant would be consistent with the public interest or the National Transportation Policy, or that the present or future public convenience and necessity requires such operations.

While it is true in a strict sense that the appellant did not propose the establishment of a new operation and that

the application under section 309(g) was filed out of abundance of caution and at the suggestion of one of the bureaus of the Commission, it is likewise true that the evidence before the Commission established that the appellant is fit, willing and able properly to perform the character of contract service sought by the application and that such service will be consistent with the public interest and the National Transportation Policy. While recognizing that most of the equipment of appellant was being used in the transportation of bulk petroleum products and that this is an emergency movement occasioned by the war, the Commission nevertheless allowed this temporary characteristic to control its ultimate conclusion. It failed to reach the point of giving serious consideration to the special characteristics of the appellant, of its desire to continue to make the kind of contracts in the future that it had made in the past and to perform the kind of transportation, including the chartering transactions, in the future that it had made in the past. The Commission also failed to consider relevant evidence which established the claims of the appellant in these respects.

A contract carrier by water is only required to establish that a proposed operation will be consistent with the public interest and the National Transportation Policy. In the *Scott Bros. Case*, 2 M. C. C. 155, 164, the Commission had occasion to construe and apply a similar phrase used in section 209 (b) of Part II of the Act. The Commission said, after considering the various decisions which threw light on that question:

"It follows from this point that its true meaning is that of 'not contradictory or hostile to the public interest.' Such decisions as we have been able to find support this interpretation of the phrase."

It requires a strained and labored interpretation of the law to justify the conclusion of the Commission that the continued operation of a water carrier such as the appel-

lant, which has used the Ohio and Mississippi Rivers and their tributaries for four generations in chartering and in other transportation transactions, could or would be hostile to the public interest, or otherwise expressed, would not be consistent with the public interest and the National Transportation Policy. In numerous decisions the Commission has held that the operation of a water carrier for a long period of time establishes, without more, that its continued operation is required by the present and future public convenience and necessity. It has held that if it should decide otherwise the Commission would not be following the direction of the National Transportation Policy of the Act to preserve a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense. *John L. Goss Corp.*, 250 I. C. C. 101, 103; *Choctaw Transportation Co.*, 250 I. C. C. 106, 107; *Reidville Oil & Guano Co.*, 250 I. C. C. 71, 73.

In the *John L. Goss Corp. Case*, the Commission said apropos of this question:

"Applicant's operation as a water carrier for fifty years is evidence of the fact that continuation of the operation is required by present and future public convenience and necessity. If we were to decide otherwise, we would not be following the direction of the national transportation policy of the act to preserve a national transportation system adequate to meet the needs of the commerce of the United States and of national defense."

The appellant has the financial ability, the willingness, and the equipment to engage in transportation and chartering transactions as a water carrier. The Commission acted arbitrarily and contrary to the evidence and the law in refusing to issue a permit to the appellant. The steel barges of appellant which are being used under existing emergency conditions to transport petroleum products in bulk can be converted, with little expense and on short notice, to general cargo vessels.

In the lower court and before the Commission the point was made that no testimony of shippers or chambers of commerce was introduced to support the application of the appellant for a permit authorizing future operations. In its report the Commission did not comment upon the absence of such testimony. Upon reflection it will be at once apparent to the court that in the nature of things it would be difficult, if not impossible, for a contract carrier, as distinguished from a common carrier, to support an application with this character of testimony. Moreover, the Commission itself has frequently commented on the lack of probative value of such testimony. For example, in the *Santa Fe Trail Stages Case*, 21 M. C. C. 725, 753-754, the Commission recited that about 50 so-called public witnesses testified in favor of the proposed operations there involved and about an equal number felt that the existing service was satisfactory and adequate. It also said that most of the witnesses who favored the extensions were actuated by a desire on general principles for more service and competitive carrier interests. It then said:

"As was said in *San Antonio & A. P. Ry. Co. Construction*, 111 I. C. C. 483, 495, sentiment in favor of new service is to be discounted inasmuch as public sentiment almost invariably favors it even where clearly unwarranted, but nevertheless it is entitled to some weight since 'in some substantial measure it is based upon experience of benefits to be derived from competition of rival * * * systems of demonstrated strength and efficiency.' Similarly, the testimony of those opposed, who were satisfied with the existing service, must also be discounted."

While appellant does not expect this court to weigh the evidence as that is the function of the Commission, it is appropriate to point out that the absence of testimony of so-called shipper or public witnesses in this case is of no significance.

The arbitrary nature of the action of the Commission here will be illustrated by contrasting that action with

the decision of Division 4 of January 11, 1945, not yet reported, in disposing of the application of the *Newtex Steamship Corporation*, No. W-896. The applicant there sought a certificate of public convenience and necessity to operate as a water common carrier in coastwise service between New York and certain Texas gulf ports. In that case the applicant has no equipment, and is not able at the present time, to perform the service sought by the application; that applicant is willing, but neither fit nor able, to perform that service. Despite these deficiencies, Division 4 found that the future public convenience and necessity will require the operations proposed by that applicant. Because that applicant has no vessels available to perform the proposed service the Commission withheld the actual issuance of the certificate for the time being.

Despite the fact that in the instant case the appellant has the equipment and the present financial ability, willingness and fitness to engage as a contract carrier by water in transportation and chartering transactions now and in the future, the Commission denied its application. The action of the Commission in the *Newtex Steamship Corporation* case cannot be reconciled with its action here. While again recognizing that inconsistency on the part of the Commission is not of itself a ground for setting aside its order, this kind of inconsistency does tend to establish appellant's claims that the Commission acted arbitrarily and capriciously in the instant case.

CONCLUSION.

It cannot be assumed that in enacting Part III of the Interstate Commerce Act Congress meant to destroy or obstruct the development of water carriers of the highly specialized type of appellant. On the contrary, the principal purpose of that act is to encourage, foster, develop and promote transportation by water in all of its forms. The decision of the Commission here assailed will defeat this purpose.

The effect of the Commission's decision, if sustained, will cause appellant irreparable injury. Without a permit to continue to handle general cargo and to engage in chartering transactions appellant will not be in position to make contracts of that character until and unless in each instance it files an appropriate application with the Commission and obtains a permit. This will involve expense and delays. Moreover, it will be difficult, if not impossible, for the appellant to function under any such procedure. In addition, unless the decision of the Commission is set aside, it will have the effect of placing in a preferred position the large common carriers by water, such as the Mississippi Valley Barge Line, the American Barge Line, the Campbell Transportation Company, and others to the detriment of river commerce and of specialized contract carriers such as the appellant. The larger carriers will be able to handle both exempt and non-exempt traffic to the extent their equipment permits, while carriers like the appellant will be restricted to the transportation of exempt traffic.

For the reasons stated it is respectfully submitted that the decision of the District Court should be reversed.

Respectfully submitted,

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Investment Building,
Washington, D. C.,
Attorney for the Appellant.

March, 1945.



APPENDIX.

PERTINENT PROVISIONS OF INTERSTATE COMMERCE ACT.

"Sec. 302 (e). The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

"The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'."

"Sec. 303 (b). Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended.

"(d) Nothing in this part shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service and certified under regulations approved by the Secretary of Commerce pursuant to the provisions of section 4417a of the Revised Statutes (U. S. C., 1934 edition, Supp. IV, title 46, sec. 391a).

"Sec. 309 (f). Except as otherwise provided in this section and section 311, no person shall engage in the business

of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: *Provided*, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. * * *

"Sec. 309 (g). Application for such permit shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require. Subject to section 310, upon application the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in this Act. The business of the carrier and the scope thereof shall be specified in such permit and there shall be attached thereto at time of issuance and from time to time thereafter such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier by water, as are necessary to carry out the requirements of this part of those lawfully established by the Commission pursuant thereto; *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his equipment, facilities, or service, within the scope of the permit, as the develop-

ment of the business and the demands of the carrier's patrons shall require."

"NATIONAL TRANSPORTATION POLICY. It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

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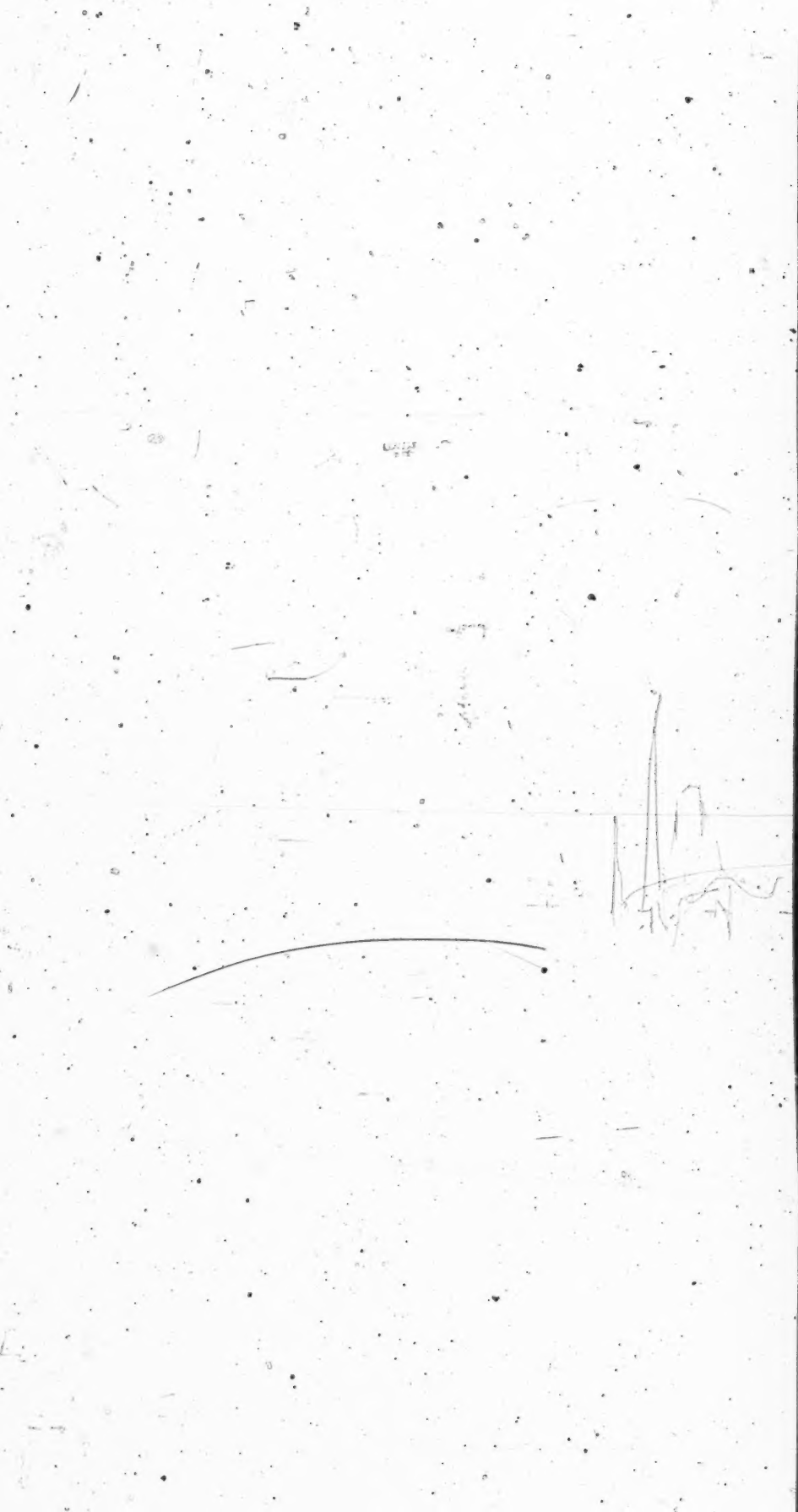
THE BARRETT LINE, INC., APPELLANT

v.

**THE UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION AND MISSISSIPPI VALLEY
BARGE LINE CO. ET AL**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO**

MOTION TO AFFIRM



**In the District Court of the United States
for the Southern District of Ohio,
Western Division**

Civil No. 881—Filed October 4, 1944

THE BARRETT LINE, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COM-
MERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph-3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,¹ entered July 28, 1944, of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission.

¹ The Court also filed a *per curiam* opinion and adopted, as its own findings of fact and conclusions of law, those set forth by the Interstate Commerce Commission.

The Commission's order, dated June 18, 1943, denied appellant's applications under Part III of the Interstate Commerce Act for a permit to operate as a contract carrier by water. An appeal was allowed on September 15, 1944, and the appeal papers were served upon appellees on September 19, 1944.

Appellant made application under the "grandfather clause" of Section 309 (f) ² of the Act for a permit to transport general commodities by water between points on the Mississippi River and its tributaries. As a matter of precaution, appellant also filed an application under Section 309 (g) ³ for a permit to conduct these same operations.

² 49 U. S. C. 909f. This section, after forbidding operations as a contract carrier without a permit from the Commission authorizing such operations, contains the following proviso known as the "grandfather clause":

Provided, That, * * * if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit without further proceedings. * * *

³ 49 U. S. C. 909g. This section, in so far as pertinent, provides that:

"upon application the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the pro-

The only testimony before the Commission related to appellant's past operations.⁴ There is no controversy regarding the facts as found by the Commission. From these findings it appears that from January 1, 1936, to August 11, 1942, the only commodities carried by appellant were stone, in bulk, petroleum products, in bulk, and fabricated steel and steel piling. Transportation of the two bulk commodities was found to be exempted from Commission regulation by Sections 303⁵ (b)⁵ or 303(d)⁶ of the Act, and the Commission refused to consider such exempt transportation as giving rise to any rights under the "grandfather clause." No

visions of this part and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in this Act."

"The only evidence before the Commission was the testimony of O. Slack Barrett, appellant's president, and an exhibit describing all services conducted by appellant between January 1, 1936, and August 11, 1942. This evidence was not contradicted or rebutted, the protestants offering no proof."

⁴ 49 U. S. C. 903 (b). This section provides that:

"Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities."

⁵ 49 U. S. C. 903. This section provides, *inter alia*:

"Nothing in this part shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service and certified under regulations approved by the Secretary of Commerce pursuant to the provisions of Section 4417a of the Revised Statutes."

handling of fabricated steel and piling, the only nonexempt commodities, was shown since a shipment of such commodities in 1936. The Commission concluded that such transportation of non-exempt commodities afforded no basis for "grandfather" rights for the reasons indicated in the following excerpt from its opinion:

Under the act "grandfather" rights must be predicated upon a showing of bona fide operations on January 1, 1940, and continuously since. The term "bona fide operations" has been interpreted to mean a holding out substantiated by actual operations consistent therewith. Actual operations in order to substantiate a claimed holding out on January 1, 1940, must have been within a reasonable length of time from that date. *What constitutes a reasonable length of time may vary with the particular circumstances in each proceeding but one shipment made in 1936 and others at an indefinite period of time prior thereto are entirely too remote to establish bona fide operations on January 1, 1940, and continuously since.* We conclude that applicant has failed to establish that it was in bona fide operation on January 1, 1940, and continuously since, in the performance of transportation subject to part III of the act. [Italics supplied.]

The Commission found, too, that certain other operations under which appellant chartered its vessels to shippers might also be subject to regula-

tion under Part III. But it concluded that these operations likewise did not form the basis for any grant of "grandfather" rights, with the following statement:

However, no showing is made as to the nature of the services rendered, the commodities carried in, or the points served with such vessels. On such meager showing we would not be warranted in finding that applicant, on January 1, 1940, and continuously since, was engaged in chartering operations.

With respect to appellant's application under Section 309 (g) the Commission made the following findings and conclusions:

Applicant, however, is not proposing any new operation. In fact, most of its equipment at present is being used in the trans-

⁷ This is by virtue of the following definition of "contract carrier by water" found in Section 302 (e) of the Act (49 U.S.C. 902 (e)):

"The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation. The furnishing for compensation (under a charter, lease, or other agreement) of a vessel; to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water.'"

portation of bulk petroleum products. We recognize the fact that this present petroleum movement is an emergency operation occasioned by the war but even considering applicant's normal operations for a period of approximately 5 years before the war it has not shown that its operation consisted of performing other than exempt transportation, except for the one shipment of fabricated steel and piling in 1936. No evidence was submitted to show that present or future public convenience and necessity require operation by applicant in the performance of transportation subject to the act. On this record we conclude that applicant has failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity require such operation.

Appellant makes four principal attacks on the Commission's order: (1) That the Commission erred in holding that it was not in bona fide operation as a contract carrier within the meaning of the Act on the "grandfather" date, January 1, 1940, because its operations on that date were all of a type exempt from regulation under the Act; (2) that the Commission improperly failed to take into consideration the fact that for a long period of time prior to the "grandfather" date it had engaged in transportation of a variety of goods not exempt from regulation under the

Act; (3) that the Commission erred in holding that, despite the fact that it engaged in certain chartering operation on the "grandfather" date, it was not in bona fide operation as a contract carrier by water; and (4) that the Commission improperly denied its application under Section 309 (g) since the record shows beyond doubt that continued operation by it would be consistent with the public interest and the national transportation policy.

It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

1. It is obvious from the statutory language of Part III that the Commission properly held that an applicant cannot establish any rights under the "grandfather clause" when it was exclusively engaged in non-exempt transportation during the "grandfather" period. Under the "grandfather clause" of Section 309 (f) an applicant must establish that it was "in bona fide operation as a 'contract carrier by water'" on and continuously after the "grandfather" date. Section 302 (e) defines the term "contract carrier by water" for purposes of Part III as meaning one "which, under individual contracts or agreements, engages in the *transportation* * * * by water of passengers or property in interstate or foreign commerce for compensation." [Italics supplied.] But the exemption provisions of Section 303 (b) and (d),

found applicable here, specifically state that "nothing in this part shall apply to the transportation * * *" (hereafter described). Consequently, an applicant which performed only operations of the exempt type was not performing "transportation" within the meaning of the Act. It follows from this that such applicant to that extent was also not a "contract carrier by water" as defined in the Act, and that it was therefore not in "bona fide operation as a contract carrier by water" within the meaning of the "grandfather clause" of Section 309 (f). The Commission's action in denying the permit here because only exempt operations were conducted during the "grandfather" period is also in accord with its consistent practice in earlier cases. Such consistent and long-standing administrative construction of a statute, particularly when it is a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion and of making the parts work efficiently and smoothly while they are yet untried and new," is entitled to great weight.

** Union Sand and Gravel Co. Application, 250 I. C. C. 141; McCarren Towing Line, Inc., Contract Carrier Application, 250 I. C. C., 168; Ralph Raike Applications, 250 I. C. C. 177, 178; Carroll Towing Co., Inc., Contract Carrier Application, 250 I. C. C. 417; Bronx Towing Line, Inc., Contract Carrier Application, 250 I. C. C. 614, 615.*

** Norwegian Nitrogen Co. v. United States, 288 U. S. 294, 315; United States v. American Trucking Associations, 310 U. S. 534, 549.*

2. The Commission also properly concluded that certain nonexempt transportation by appellant, conducted long before the "grandfather" date, afforded no basis for granting appellant any "grandfather" rights. Inasmuch as Congress selected January 1, 1940, as the critical date under the "grandfather" clause, the Commission was not at liberty to base a permit under that clause upon operations last conducted well before that date. This Court has frequently recognized that the comparable "grandfather" clause relating to motor carriers, being an exemption from a remedial statute, is to be construed as extending only to carriers plainly within its terms.¹⁰ While the Commission recognized that it might look to operations conducted within a reasonable time prior to January 1, 1940, it concluded in the present case that but one shipment of a nonexempt nature made in 1936 and others at an indefinite period prior thereto were entirely too remote to establish bona fide operations of a nonexempt type on January 1, 1940. Such conclusion is again in complete accord with the Commission's uniform course of decision in other proceedings,¹¹ and its correctness seems obvious.

¹⁰ *McDonald v. Thompson*, 305 U. S. 263, 266; *Gregg Cartage Co. v. United States*, 316 U. S. 74, 83; *Crescent Express Lines v. United States*, 320 U. S. 404, 409.

¹¹ The Commission has held that shipments one year before the "grandfather" date are too remote. *Thomas River Line, Inc., Common Carrier Application*; 250 I. C. C. 245, 246. Likewise, 1938 has been held too remote. *C. K. Willis Con-*

3. Although it appears that appellant in its chartering operations was by virtue of Section 302 (e) engaging in transportation as a contract carrier "as to the vessels so furnished", the Commission was also justified in denying appellant a permit to continue such operations, because no showing was made as to the nature of the services rendered, the commodities carried in, or the points served with the vessels. Section 309 (g) requires the Commission in granting any permit to specify the business of the carrier and the scope thereof. It is settled by this Court's decision in *Noble v. United States*, 319 U. S. 88, 92, dealing with identical language in Part II of the Act with respect to contract carriers by motor vehicle, that the Commission in so specifying the business in a "grandfather" case must endeavor to preserve substantial parity between future operations and prior bona fide operations.¹² The same case holds¹³ that "an accurate description of the 'business' of a particular contract carrier and the

tract Carrier Application, 250 I. C. C. 179, 181; *Tennessee Valley Sand & Gravel Co. Common Carrier Application*, 250 I. C. C. 599, 602. It has also held 1937 too remote (*River Sand & Gravel Co. Contract Carrier Application*, 250 I. C. C. 370), as well as 1936. *Choctaw Transportation Co. Contract Carrier Application*, 250 I. C. C. 106, 107.

¹² The same is held with respect to the "grandfather clause" relating to common carriers by motor in *Alton R. Co. v. United States*, 315 U. S. 15, 22; *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 481; *Crescent Express Lines v. United States*, *supra*, 409.

¹³ 319 U. S. 88, 91.

'scope' of its enterprise may require more than a statement of the territory served and the commodities hauled." Obviously the Commission cannot carry out the mandate of the above section where the record, as here, was totally barren of information as to the exact nature of the services rendered, the commodities carried in, or the points served with the vessels during the "grandfather" period. Appellants have in this respect failed to satisfy the heavy burden of proof thrust upon them under the "grandfather clause".¹⁴ Furthermore, even if these chartering operations had been considered as supporting some "grandfather" rights, they obviously would not, under the above criterion of substantial parity between past and future operations, have justified a permit to appellant to engage in transportation, in the more orthodox sense, of general commodities. That was the broad nature of the permit appellant sought and the only type permit it has ever indicated a willingness to accept.

4. The Commission's denial of the application under Section 309 (g) because the record did not establish that public convenience and necessity required appellant's operations as a common carrier of general commodities or that such operations as a contract carrier would be consistent with the public interest and the national transportation policy, must also be sustained. What is required by the public convenience and neces-

¹⁴ See cases cited in footnote 10, *supra*.

sity and what is required by the public interest are both ultimate questions of fact for the expert judgment of the Commission, whose determination thereof will not be set aside if supported by a rational basis and substantial evidence.¹⁵ Though the meaning of "public convenience and necessity" and "public interest" is not identical, both have reference to the public need for adequate transportation.¹⁶ Here there was no evidence by shippers as to any need for any new operations by appellant, nor was there any showing of inadequacy of the existing transportation facilities. The only evidence as to public convenience and necessity or public interest here was the fact that appellant had in the past been in operation. Although the Commission has considered continuous past operations as an indication that public convenience and necessity or public interest required continuance of such operations, that was in the case of nonexempt operations of the type for which operating authority was sought.¹⁷ Here

¹⁵ *Chesapeake & Ohio Ry. v. United States*, 283 U. S. 35, 42; *Rochester Telephone Corp. v. United States*, 307 U. S. 123, 145-146; *Davidson Transfer & Storage Co. v. United States*, 42 F. Supp. 215 (D. C. E. D. Pa.), affirmed *per curiam*, 317 U. S. 587; *McLean Trucking Co. v. United States*, 321 U. S. 67, 87-88.

¹⁶ *Chesapeake & Ohio Ry. v. United States*; *supra*, 42; *New York Central Securities Co. v. United States*, 287 U. S. 12, 25; *Werner Extension*, 9 M. C. C. 267, 268.

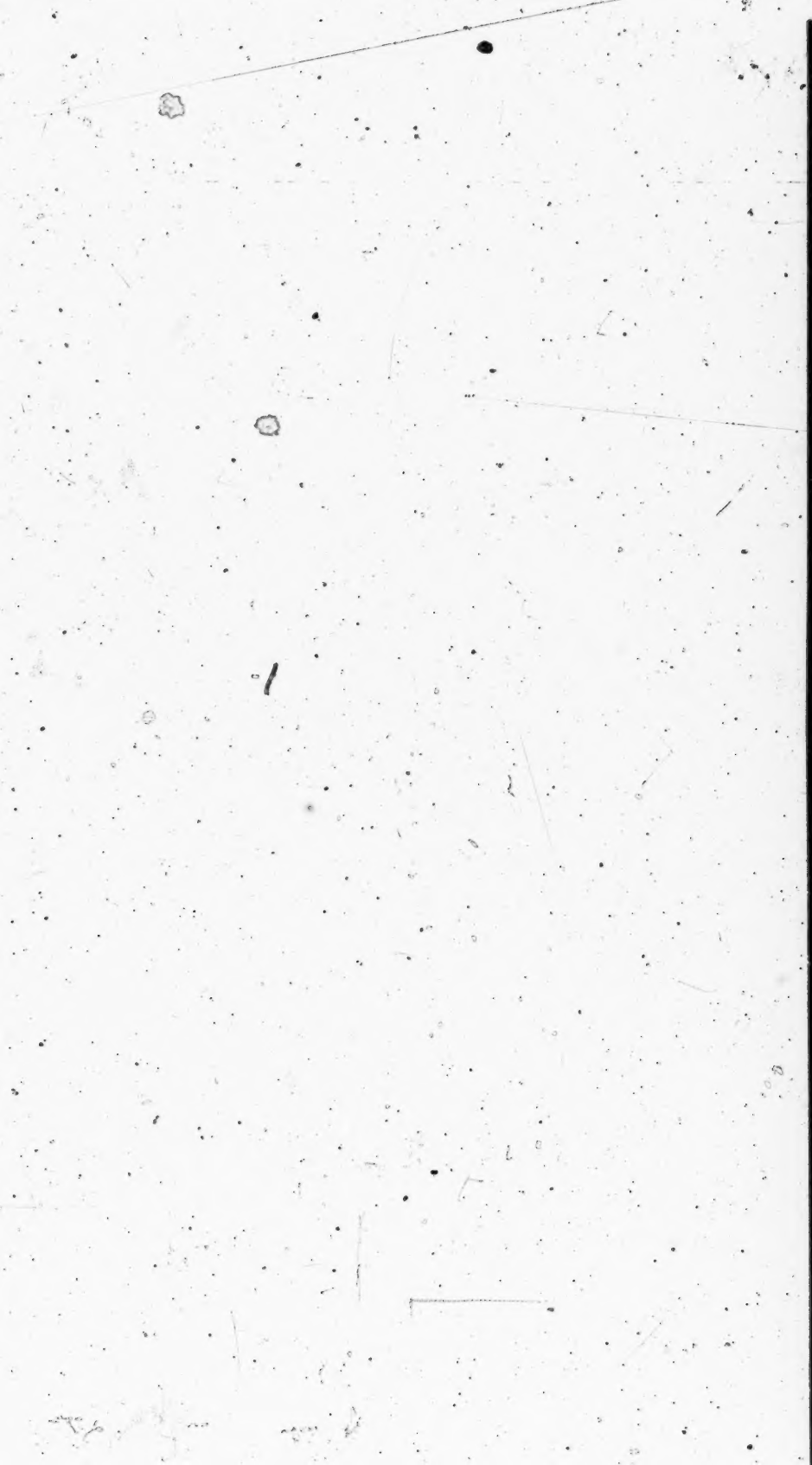
¹⁷ *Reidville Oil & Guano Co. Contract Carrier Application*, 250 I. C. C. 71, 73; *John L. Goss Contract Carrier Application*, 250 I. C. C. 101, 103; *Choctaw Transportation Co. Contract Carrier Application*, 250 I. C. C. 101, 103.

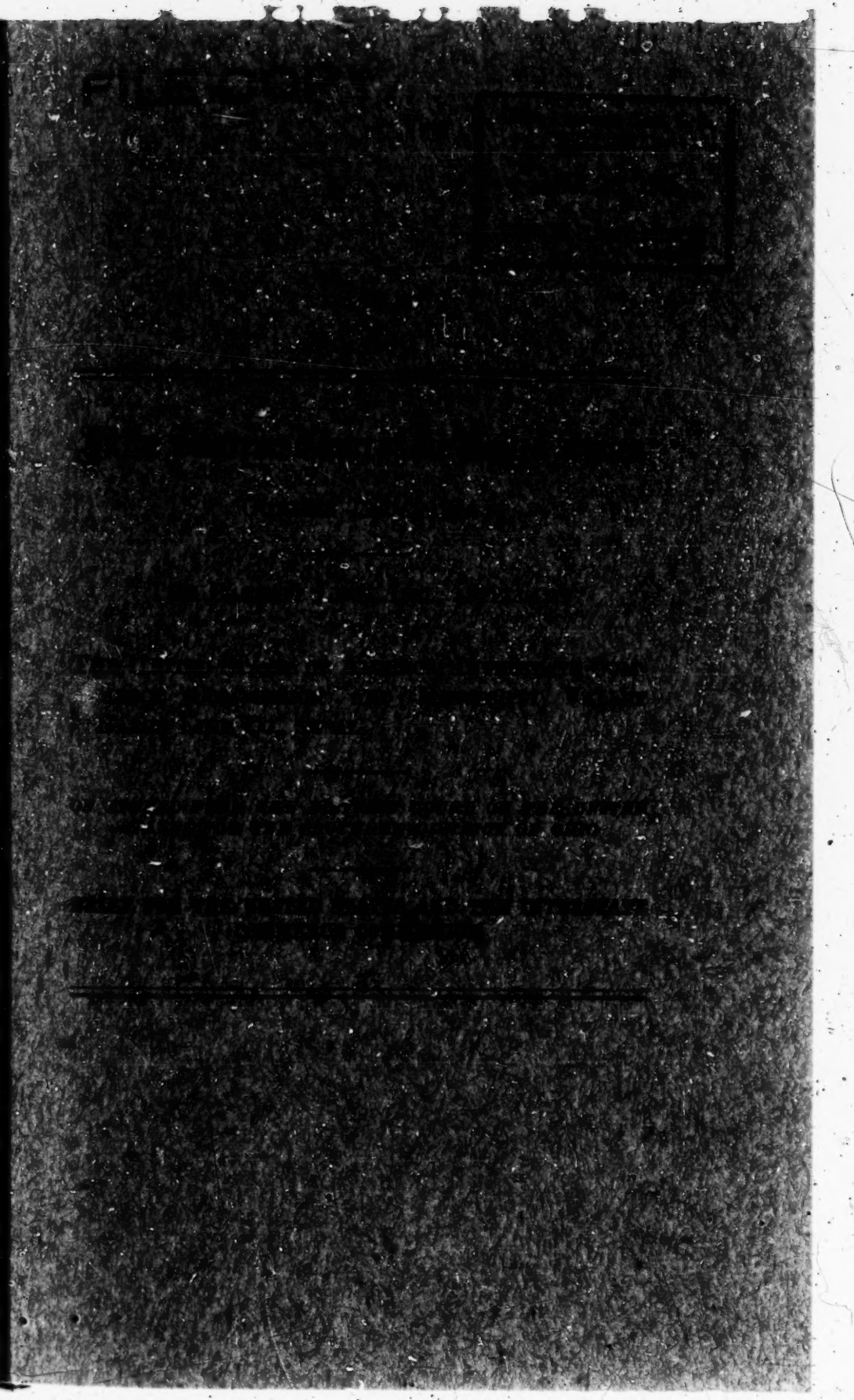
no nonexempt operations had been conducted since 1936. The Commission further points out that though appellant's present exempt petroleum movement is an emergency operation occasioned by the war, even considering its normal operation for a period of approximately five years before the war, there was no showing of non-exempt transportation except for the one shipment of fabricated steel and piling in 1936. Certainly under these circumstances there was a rational basis in the record for the Commission's conclusion that appellant's past operations did not establish any existing public necessity for it to engage in wide scale non-exempt operations or that such operations would be in the public interest.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be affirmed.

✓ (S) CHARLES FAHY,
Charles Fahy,
Solicitor General.

✓ (S) DANIEL W. KNOWLTON,
Daniel W. Knowlton,
*Chief Counsel, Interstate
Commerce Commission.*





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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 630

THE BARRETT LINE, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND MISSISSIPPI VALLEY BARGE LINE CO., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The *per curiam* opinion of the district court (R. 28-29) was rendered on July 28, 1944, but is not reported. The report of the Interstate Commerce Commission (R. 8-13) is not published.

JURISDICTION

The final decree of the three-judge district court was entered on July 28, 1944 (R. 29). Petition for appeal was presented and allowed on Sep-

September 15, 1944 (R. 36, 33-34). Probable jurisdiction was noted on December 4, 1944 (R. 149). The jurisdiction of this Court is conferred by Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission properly held that a contract water carrier is not entitled to a "grandfather" permit under Part III of the Interstate Commerce Act, where the carrier's operations were exempt from regulation or remote from the "grandfather" date, or were found to be insufficiently proved.

2. Whether appellant showed that its proposed operations would be consistent with the public interest and the national transportation policy, thereby entitling it to a permit to engage in new operations as a contract water carrier.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, as amended, are set forth in the Appendix, *infra*, pp. 45-49.

STATEMENT

By applications filed with the Interstate Commerce Commission on May 19, 1941, appellant

water carrier, the Barrett Line, Inc., sought a permit as a contract carrier by water, in interstate or foreign commerce, of general commodities, with certain exceptions, between points on the Mississippi River and its tributaries. Under Section 309 (f) of Part III of the Interstate Commerce Act (49 U. S. C. 909 (f)), appellant sought "grandfather" rights (R. 35-43), and, as a precautionary measure, "new" rights (R. 49-52) to perform such operations. In the alternative, appellant sought a certificate (R. 36, 51) as a common carrier under Section 309 (a) (49 U. S. C. 909 (a)). (R. 9.)

Division 4 of the Commission found that appellant or its predecessors had conducted water-carrier operations on the Mississippi River and its tributaries for approximately a hundred years. Its equipment included, at the time of hearing, two towboats and twenty-one barges. Ordinary operations were under term contracts entailing the movement of large quantities of material over periods of time averaging several months. The contracts were negotiated on the basis of the nature and volume of cargo, time required for delivery, the season of the year, and other factors which might affect the cost of transportation. Single-trip shipments were occasionally accepted under special circumstances. (R. 10.)

Protests against the granting of the application were filed by other water carriers (R. 63), after

which a hearing was held on September 1, 1942, before one of the Commission's examiners, at which testimony and exhibits were submitted by appellant (R. 63-144), providing a description of the operations from January 1, 1936, to August 11, 1942, and including specific statements as to the transportation performed in this period of some six and one-half years (R. 9, 10). The Commission found that an exhibit of record (R. 117-126) contained a description of all services performed by appellant in this period. This evidence reveals, as the Commission found, that the transportation, except for one shipment of fabricated steel and piling in 1936, was largely of bulk commodities consisting of stone and petroleum products, exempt from regulation under provisions of Section 303 (b) and (d). Other services rendered in this period consisted of towing for other carriers or for shippers of bulk commodities, chartering vessels to carriers or shippers, salvage operations, storage of vessels belonging to others, and furnishing steam to other vessels for boiler cleaning. Of these other services, the Commission stated that only the chartering of vessels might be subject to regulation under the Act. The proof as to the chartering of vessels did not disclose the nature of the services rendered, the commodities transported, or the points served. Under the proof submitted, the Commission held that it would not be warranted in finding that appellant

was on the "grandfather" date, January 1, 1940, and continuously since, engaged in chartering operations subject to regulation under the Act. In one instance in 1936, a contractor's fleet of work boats was moved, which operation the Commission termed probably exempt from regulation under its order of October 29, 1941, in Ex Parte 147, *Towage of Floating Objects*.³ (R. 10, 11, 80, 118.) There was testimony to the effect that at some indefinite time prior to 1936, appellant had engaged in certain non-exempt transportation, but this claim was not supported by shipping records (R. 117-126), except for the shipment of fabricated steel and piling in 1936 (R. 11, 12).

The Commission held that "grandfather" rights must be predicated upon proof of *bona fide* operation on and since January 1, 1940 (sec. 309 (f)), that *bona fide* operation means a holding out substantiated by actual operations consistent therewith, and that actual operations must have been within a reasonable length of time from the date

By this order, the Commission had exempted the transportation of certain floating objects by contract carriers from the requirements of Part III of the Interstate Commerce Act, in view of the provisions of Section 303 (e) thereof (49 U. S. C. 903 (e)). See 250 I. C. C. 525. However, in *Towage of Floating Objects (Logs and Piling in Rafts)*, 250 I. C. C. 525, the order was vacated insofar as it applied to the transportation of logs and piling in rafts, for the Commission determined that such transportation involved competition with common carriers subject to Part I, II or III of the Act and therefore was not within the exemption of Section 303 (e).

of January 1, 1940. It stated that a reasonable length of time may vary with the particular circumstances in each proceeding, but that one non-exempt shipment in 1936 and others at an indefinite period of time prior thereto were entirely too remote to establish *bona fide* operation on January 1, 1940. (R. 11-12.)

In respect to the second application seeking a permit or certificate authorizing new operations, the Commission found that the application proposed no new operation, since appellant proposed no change in mode of operation but planned to continue doing business as in the past. Most of appellant's equipment was then being used in the exempt transportation of bulk petroleum products. It was recognized that the petroleum movement at that time was an emergency operation occasioned by the war, but the Commission considered applicant's normal operation for a period of approximately five years before the war as determinative of the operating rights involved. During that period the only non-exempt transportation performed was the one shipment of fabricated steel and piling in 1936. No evidence was submitted to show present or future public convenience and necessity for the proposed operation. The Commission found that appellant had failed to show that it proposed any new operation, or that a new operation by it would be consistent with the public interest or the national transpor-

tation policy (sec. 309 (g)) or required by public convenience and necessity (sec. 309 (a)). (R. 12.)

The ultimate finding of the Commission was that appellant was not in *bona fide* operation on and since January 1, 1940, as a common or contract carrier by water, in performance of transportation subject to the provisions of Part III of the Act, that it had not been shown that a new operation by the applicant, as a contract carrier by water would be consistent with the public interest and the national transportation policy, or that present or future public convenience or necessity would require such new operation by it as a common carrier. Accordingly, the applications were denied. (R. 12-13.) The Commission's report and order were entered on June 18, 1943 (R. 8-13). Appellant's petition for reconsideration (R. 14-23) was denied by the full Commission on December 6, 1943 (R. 14).

Appellant filed its complaint in the United States District Court for the Southern District of Ohio on April 3, 1944 (R. 1-8). Answers were filed by the United States and by the Commission (R. 24-28) denying the material allegations of the complaint. Interventions were filed in support of the Commission's order by the American Barge Line Company, the Union Barge Line Corporation, the Campbell Transportation Company, and the Mississippi Valley Barge Line Company, which are parties here (see R. 33, 148-149). On July 28, 1944, the court filed a *per curiam*

opinion, sustaining the Commission's order in all respects, and adopting by reference the findings and conclusions of the Commission, as stated in Division 4's report of June 18, 1943 (R. 8-13), as the court's findings of fact and conclusions of law (R. 28-29). The decree dismissing the complaint was entered on the same day (R. 29). This Court noted probable jurisdiction on December 4, 1944 (R. 149).

SUMMARY OF ARGUMENT

I

A. Those of appellant's operations which are exempt under Section 303 (b) and (d) of Part III of the Interstate Commerce Act furnish no basis for a "grandfather" permit as a contract carrier under Section 309 (f). To be a contract carrier by water, one must be engaging in "transportation". Section 302 (e). However, Part III of the Act is made inapplicable by Section 303 (b) and (d) to "transportation" by water of certain commodities. Consequently, transportation of such commodities would not entitle appellant to a permit under Section 309 (f), for as to them it would not be "in bona fide operation as a contract carrier by water" (see 309 (f)). The legislative history of the Act and decisions of the Commission support the view that permits may only be granted for non-exempt transportation. In *Russell Bros. Towing Co., Inc., Common Car-*

rier Application, 250 I. C. C. 429, and *Moran Towing & Transportation Co., Inc. Applications*, 260 I. C. C. 269, on which appellant relies, the carriers' transportation was both non-exempt and exempt. Those cases have not been applied where the transportation was entirely exempt. *Upper Mississippi Towing Corp. Common Carrier Applications*, 260 I. C. C. 292, 293; cf. *Central Barge Co. Applications*, 260 I. C. C. 329, 334, 339.

B. Other than its chartering operations, appellant's non-exempt operations were too remote from January 1, 1940, the "grandfather" date, to entitle it to a "grandfather" permit under Section 309 (f). In the six years before the hearing, appellant's only non-exempt shipment took place in 1936. Other non-exempt transportation, not evidenced by shipping records, occurred from 20 to 25 years before the statutory date or at some undisclosed time prior to 1936. The legislative history of Part III of the Act indicates that Congress meant to establish a definite date upon which water carriers must have been operating in order to receive a permit without proving public interest in its operations. It also indicates that Congress intended that the judicial and administrative interpretations of Part II, containing the motor-carrier provisions, be followed in interpreting Part III. Interpretations of Part II establish that "grandfather" rights must be strictly construed and that the burden is on the applicant

to show the applicability of the "grandfather" clause. *E. g., United States v. Carolina Carriers Corp.*, 315 U. S. 475, 480-481; *McDonald v. Thompson*, 305 U. S. 263, 266. Because of the nature of their service, the Commission has been more lenient with water carriers than with motor carriers, but it has frequently held that proof of operations several years before the "grandfather" date and not since, is too remote from that date to entitle a water carrier to "grandfather" rights. Its interpretation is entitled to great weight. *United States v. American Trucking Associations*, 310 U. S. 534, 549.

C. Appellant's chartering operations do not entitle it to a "grandfather" permit, for all but two were evidently exempt from regulation by Section 303 (b) and (d) and Section 303 (g). The two non-exempt instances occurred either after the critical date or too long before it to establish "grandfather" rights.

The Commission may give only that weight to an applicant's evidence as seems proper (*Swaine & Hoyt, Ltd. v. United States*, 300 U. S. 297), and here it held that appellant's evidence of chartering operations was too meager. The record was too barren of information to enable the Commission to specify the "business of the carrier and the scope thereof" (see, 309 (g)).

C. F. Harms Co. Contract Carrier Application, 260 I. C. C. 171, does not conflict with the Commission's decision herein, for the applicant there

had furnished sufficient proof of "grandfather" chartering operations. In that case, the Commission followed the rule that "grandfather" rights can only be predicated on a showing of what the applicant "does in bona fide operation" on the statutory date. Here there was no such showing. At any rate, courts are not concerned with the consistency or inconsistency of the Commission's decision in a particular case with ^{other} ~~prior~~ decisions which it has rendered. *E. g., Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 271.

II

Appellant's president and counsel stated at the hearing that appellant applied in the alternative under Section 309 (g) for "new" rights to operate "out of an abundance of caution" and that they thought such an application never applied to it, but the Commission's refusal to grant such rights is now assailed. Before the Commission may issue a "new" permit, it must find that the applicant's proposed service "will be consistent with the public interest and the national transportation policy" (see 309 (g)). It held that appellant failed to show that its service would be consistent with these standards. These standards have reference to the public need for adequate transportation (see *N. Y. Central Securities Co. v. United States*, 287 U. S. 12, 25), and what is consistent with them is an ultimate question of fact for the Commission,

whose determination thereof will not be set aside if supported by a rational basis and substantial evidence. Cf. *McLean Trucking Co. v. United States*, 321 U. S. 67, 87-88.

The only evidence that the proposed operations would be consistent with the public interest and national transportation policy was the fact that appellant had in the past been in operation. Here, no non-exempt operations had been conducted since 1936, except possibly a few insufficiently proved chartering operations. Certainly appellant's exempt transportation does not furnish evidential value that non-exempt transportation by it would be consistent with the dual standards prescribed by Section 309 (g). It would not "foster sound economic conditions" within the national policy to grant a "new" permit to appellant, when so far as shown, there is no public need for such service.

It was not erroneous for the Commission to overrule its trial examiner's recommendation that a "new" permit be issued, for Congress vested the decision-making authority in the Commission rather than its examiners. *Baltimore & Ohio Railroad Co. v. United States*, 298 U. S. 349, 370-371.

ARGUMENT

Introductory—Although appellant filed an alternative application for a "grandfather" or pub-

lie convenience and necessity certificate as a common carrier by water, it has apparently abandoned all claims except for a permit authorizing either "grandfather" or "new" rights as a contract carrier by water (Br. 2). Hence, this brief will not deal with common carriage.

I

THE COMMISSION PROPERLY HELD THAT APPELLANT WAS NOT ENTITLED TO A PERMIT BASED ON "GRANDFATHER" RIGHTS

A. APPELLANT'S EXEMPT OPERATIONS FURNISH NO BASIS FOR A "GRANDFATHER" PERMIT

Appellant transported stone in bulk and petroleum products on and since January 1, 1940 (R. 123-126). The transportation by water carriers of bulk commodities and liquid cargoes is expressly exempted from regulation by Section 303 (b) and (d) of Part III of the Interstate Commerce Act (Appendix, *infra*, p. 46). It is nevertheless contended that the transportation of such commodities constitutes "bona fide operation" on the "grandfather" date under Section 309 (f) (Appendix, *infra*, pp. 47-48), entitling appellant to a "grandfather" permit (Br. 13-15). The Commission held that appellant "failed to establish that it was in bona fide operation on January 1, 1940, and continuously since, in the performance of transportation subject to part III of the act" (R. 12).

It seems to be appellant's view that since Section 309 (f) provides that a permit should issue to a carrier engaged in *bona fide* operations as a contract carrier by water on January 1, 1940, and since the definition of a contract carrier by water in Section 302 (e)² does not refer to exemptions, its exempt operations furnish the basis for a "grandfather" permit. This argument overlooks the fact that to be a "contract carrier by water," a carrier must, as defined in Section 302 (e), be engaging in "transportation", and Section 303 (b) and (d) provides that "Nothing in this part [III] shall apply to the transportation" by water "of commodities in bulk" and "of liquid cargoes in bulk." Consequently, Section 309 (f), containing the "grandfather" clause for permits, is inoperative where the carrier is conducting only exempt operations; for such a carrier is not "in bona fide operation as a contract carrier by water" (sec. 309 (f)).

Appellant is in an anomalous position in seeking a permit, for at the Hearings on the legislation which became the Transportation Act of 1940 (54 Stat. 898), including Part III, its president³ opposed the applicability of the proposed

² Section 302 (e) provides in pertinent part:

The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

enactment to its business, and the legislators were favoring him, as well as other water carriers opposing this legislation, by the exemption provisions. Hearings, S. Committee on Interstate Commerce, S. 2009, 76th Cong., 1st sess., pp. 357-374; Hearings, H. Committee on Interstate and Foreign Commerce, H. R. 2531 and H. R. 4862, 76th Cong., 1st sess., pp. 1063, 1083, 1093; see 86 Cong. Rec. 11768; 84 Cong. Rec. 5871, 5884, 9700, 10102. No regulation was intended whenever the exemption provisions applied. H. Rep. No. 1217, 76th Cong., 1st sess., pp. 20-21.³ The following portion of the Conference Report on S. 2009, which became the Transportation Act of 1940, evidences that permits or certificates are only to be granted for non-exempt transportation:

The conference bill includes as section 303 (1) a new provision providing that whenever transportation exempted under the provisions of subsection (g) or (e) of such section becomes subject to regulation the carrier may continue operation for 120 days without a certificate or permit, and if application for a certificate or permit covering the previously exempted transportation is made within such period, the Commission shall issue a certificate or permit, whichever is appropriate, authorizing the transportation previously exempted. [H. Rep. No. 2016, 76th Cong., 3d sess., p. 78.]

³ For further discussion of the exemptions, see *idem*, pp. 7-8; H. Rep. No. 2892, 76th Cong., 3d sess., pp. 83-84.

Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, explained on the floor of the Senate that "We are not regulating the bulk carriers either. So the bill [S. 2009] does not affect them" (84 Cong. Rec. 5877). And Representative Bulwinkle, a sponsor of the bill, read on the floor of the House the following excerpt from H. Rep. No. 1217, 76th Cong., 1st sess.:

Subsections (b) and (c) [of Section 303] are unqualified exemptions, and the carriers exempted are not required to apply to the Commission for exemption. These exemptions are written in terms of the transportation engaged in, so that any other transportation which the carriers may engage in will be subject to such regulation as may be provided for. [84 Cong. Rec. 9765.]

In accord with the obvious meaning of the exemption provisions, the Interstate Commerce Commission has denied "grandfather" permits or certificates to water carriers whose transportation is exempt. *Upper Mississippi Towing Corp. Common Carrier Applications*, 260 I. C. C. 292, 293; *Gallagher Bros. Sand & Gravel Corp. Con-*

* In the *Upper Mississippi Towing Corp.* case, the entire Commission held that "no certificate could be issued to authorize such activities [transporting bulk and liquid commodities and towing for other carriers] because the provisions of part III do not apply to transportation services of those types, by reason of the exemptions in section 303 (b), (d), and (f) (2)." (260 I. C. C. at p. 203.)

tract Carrier Application, 260 I. C. C. 224, 225.⁵ Appellant relies, however, on *Russell Bros. Towing Co., Inc., Common Carrier Application*, 250 I. C. C. 429, and *Moran Towing & Transportation Co., Inc., Applications*, 260 I. C. C. 269 (Br. 13, 14-15). In the *Russell Bros.* case, Division 4 of the Commission held that in determining the applicant's "grandfather" rights, both its exempt and non-exempt transportation should be considered to avoid obtaining "an incomplete and distorted picture of the nature and extent of its operations" (250 I. C. C. at p. 434).⁶ However, in a later case, *Card Towing Line, Inc., Contract Carrier Application*, 250 I. C. C. 621, Division 4 made it clear that the *Russell Bros.* doctrine does not apply to a carrier whose transportation is entirely exempt, and it took the same view in the instant case, which was decided almost a year after the *Russell Bros.* case. The entire Commission similarly limited the *Russell Bros.* case in

⁵ See also *Union Sand and Gravel Co. Applications*, 250 I. C. C. 141; *McCarren Towing Line, Inc., Contract Carrier Application*, 250 I. C. C. 168; *Ralph Raikie Applications*, 250 I. C. C. 77, 178; *River Sand and Gravel Co. Contract Carrier Application*, 250 I. C. C. 370; *Carroll Towing Co., Inc., Contract Carrier Application*, 250 I. C. C. 417; *Bronx Towing Line, Inc., Contract Carrier Application*, 250 I. C. C. 614, 615; cf. *Atracoal Transportation Company Contract Carrier Application*, decided February 12, 1945, by Division 4, not yet reported.

⁶ For an excellent discussion of the limits to which the *Russell Bros.* doctrine should be extended, see Commissioner Miller's dissent in the *Moran Towing* case, 260 I. C. C. 269, 280.

Upper Mississippi Towing Corp. Common Carrier Applications, 260 I. C. C. 292, 293, decided last May.

In *Moran Towing & Transportation Co., Inc., Applications*, the case was heard first by Division 4 (250 I. C. C. 541) and then by the entire Commission (260 I. C. C. 269).⁷ Division 4 granted a "grandfather" certificate to the applicant, which had been engaged in the general towage service. The Commission stated that the evidence showed that the "applicant did not attempt to restrict its ["grandfather"] services to those operations which have been exempted" (250 I. C. C. at p. 546), and that its service was performed without regard to the nature of the cargo carried (260 I. C. C. at p. 282), which factors distinguish it from the present case. The entire Commission recognized that some of Moran's service was subject to regulation under Part III rather than exempt (260 I. C. C. at p. 271). Furthermore, it relied on the *Russell Bros.* doctrine, which, less than three months before, it had limited to situations where some of the transportation was non-exempt (*Upper Mississippi Towing Corp. Common Carrier Applications*, 260 I. C. C. 292, 293). Also, it denied Moran "grandfather" rights where

⁷ The entire Commission cut down the territorial scope of the "grandfather" certificate granted by Division 4 because the applicants' transportation to certain areas had been performed a year before the "grandfather" date. In all other respects, Division 4's decision was affirmed.

only exempt transportation of oil (sec. 303 (d)) was involved (260 I. C. C. at p. 275). We therefore do not believe that the Commission meant to depart from the requirement established in innumerable cases that at least part of the transportation must have been non-exempt. Division 4 has seemingly taken a similar view of the final decision in the *Moran Towing* case, for in *Central Barge Co. Applications*, 260 I. C. C. 329, 334, 339, before issuing a "grandfather" certificate, it pointed out that some of the transportation involved was non-exempt. See also *Bouchard Transportation Co., Inc., Contract Carrier Application*, decided March 10, 1945, by Division 4, not yet reported; *Independent Pier Company Contract Carrier Application*, decided June 2, 1944, by Division 4, not yet reported; *Sheridan Transportation Company Contract Carrier Application*, decided March 18, 1944, by Division 4, not yet reported; cf. *Atacaul Transportation Company Contract Carrier Application*, decided February 12, 1945, by Division 4, not yet reported.

The full Commission evidently considered the *Moran Towing* and *Russell Bros.* cases to be inapplicable to the present case, where (according to the proof established for the "grandfather" period) only exempt transportation was involved, for it denied (R. 14) appellant's petition for reconsideration which relied on both those decisions (R. 18). If this Court believes that the *Moran Towing* case expresses the view that the Commis-

sion is authorized to issue "grandfather" permits or certificates when the entire transportation is exempt, it is submitted that in order to guide the Commission and curtail litigation the case should be disapproved as conflicting with the exemption provisions of Part III of the Act.

B. APPELLANT'S NON-EXEMPT OPERATIONS, OTHER THAN ITS CHARTERING OPERATIONS, WERE TOO REMOTE FROM THE "GRANDFATHER" DATE

Under the provisions of Section 309 (f) of Part III of the Interstate Commerce Act (49 U. S. C. 909 (f)), appellant would be entitled to a "grandfather" permit as a contract carrier by water upon proof that it was "in bona fide operation as a contract carrier by water on January 1, 1940, * * * and has so operated since that time."

Appellant's operations since January 1, 1940, have been practically without change, and therefore its right to a "grandfather" permit depends entirely upon the evidence of operation on January 1, 1940. There is no dispute as to that evidence. The controversy concerns appellant's contention that the Commission has applied the evidence contrary to the meaning of the statute.

Appellant does not deny that, other than chartering operations, its operations on January 1, 1940, consisted solely of exempt transportation of bulk stone and petroleum products. The only non-exempt shipment in the period of more than six years from January 1, 1936, to August 11, 1942, the final date in appellant's exhibit of opera-

tions (R. 117-126), was of fabricated steel and piling and took place in November 1936 (R. 119). Besides depending upon this shipment to establish "grandfather" rights, appellant states that its operations as a water carrier were by nature sporadic, irregular, and infrequent, making it impossible to select any limited period of its existence as representative of its business. Accordingly, its president, Mr. Barrett, testified that prior to 1936, there were shipments of a variety of commodities, some not exempt by statute, which, with the one 1936 shipment of fabricated steel and piling, allegedly suffice to support its claim for the "grandfather" permit, as contemplated by Section 309 (f). Mr. Barrett testified to transportation of steel pipe from Pittsburgh to New Orleans for some four or five months in 1920, when railroads were embargoed from handling pipe; and for two or three months in 1920 of powder from Nitro, West Virginia, and Old Hickory, Tennessee, to shipside, New Orleans (R. 67-68). He also claimed that his company pioneered in the movement of cement, oil, automobiles, bauxite ore, and paving brick, the automobile trade lasting for a number of months, and the bauxite ore being taken over by the Aluminum Company as a private carrier (R. 68-69). The transportation of automobiles occurred in 1918 (R. 103), the bauxite

* The shipment of steel and piling is the only non-exempt one reflected by appellant's shipping records (R. 117-126).

MICRO CARD

TRADE MARK



22

44

1907²



63

m

microcard

ore prior to 1915-1916 (R. 113), and the other commodities mentioned in the testimony were transported at some undisclosed time prior to 1936 (R. 85). Transportation of the fabricated steel and piling shipped in 1936 and of some of the various commodities named by Mr. Barrett is not exempt from regulation. The Commission held these shipments too remote from the crucial date of January 1, 1940, to sustain the claim of "bona fide operation" on that date, as required by Section 309 (f) for "grandfather" permits.

The Commission has distinguished the characteristics of water carriage from motor carriage, where transportation even a few months before the motor-carrier "grandfather" date of June 1, 1935, has been held insufficient to support a claim of "bona fide operation" on that date. No such

* The phrase "bona fide operation" is also found in Section 206 (a) and 209 (a) of the Interstate Commerce Act, containing the "grandfather" provisions for motor carriers. The Commission has held in many cases that shipments more than a few months prior to June 1, 1935, are too remote to evidence "bona fide operations" on that date. In *Jack Cole Company, Inc. v. United States*, No. 850 this Term, decided February 12, 1945, the Commission held that an interruption of service of less than a year, occurring after June 1, 1935, and before the hearings were completed, constituted a fatal interruption of service which were actually conducted on the "grandfather" date. The judgment of the district court upholding the Commission was affirmed by this Court. In *Gregg Cartage Co. v. United States*, 316 U. S. 74, the Commission's decision that an interruption of some three or four months, due to receivership, constituted a fatal interruption of service, was sustained.

rigid requirement as to the "grandfather" date of Section 309 (f) has been made in the case of water carriers,¹⁰ because the Commission has recognized that water-carrier operations are by nature more irregular and infrequent. Appellant made just one non-exempt shipment within the six-year period preceding the hearing, and this occurred more than three years prior to January 1, 1940. Besides chartering operations, discussed *infra*, pp. 30-37, the only other claimed non-exempt shipments occurred at undisclosed dates prior to 1936, such as iron pipe and powder some 22 years, and automobiles and bauxite ore some 25 years before January 1, 1940.

In effect, appellant asks the Court to hold that operations conducted 20 to 25 years prior to the "grandfather" date, with one shipment some three

¹⁰ See *Moran Towing & Transportation Co., Inc., Applications*, 260 I. C. C. 269, 273; *Thames River Line, Inc., Common Carrier Application*, 250 I. C. C. 245; *C. G. Willis Contract Carrier Applications*, 250 I. C. C. 179; *Tennessee Valley Sand & Gravel Co. Common and Contract Carrier Application*, 250 I. C. C. 599; *River Sand & Gravel Co. Contract Carrier Application*, 250 I. C. C. 376; *Chocataw Transportation Co. Contract Carrier Application*, 250 I. C. C. 106, 107; *Pope & Talbot, Inc., Common and Contract Carrier Applications*, 250 I. C. C. 117; *Schafer Bros. S. S. Lines Contract Carrier Application*, 250 I. C. C. 353. Appellant relies on the last two cases (Br. 15). There the applicants had been in non-exempt operation on and since January 1, 1940. Certain ports which the applicants had omitted to serve in the "grandfather" period were included in the authority granted because of the peculiarities of applicants' lumber trade, and because they had continued to hold out to serve such ports in that period and had actively solicited requests to serve them.

years prior to that date, are sufficient to prove "bona fide operation" on and since January 1, 1940, as required for the issuance of a permit under Section 309 (f). Under the uncontroverted facts of the case and disregarding appellant's chartering operations, appellant would only be entitled to a permit under Section 309 (f) if the transportation conducted in 1915-1916, 1918 and 1920, and the one shipment in 1936, should be held to constitute *bona fide* operations on and since January 1, 1940. To so decide would necessitate interpreting the legislative phrase, "January 1, 1940," as including operations in all those preceding years. The legislative history of Part III of the Act indicates a purpose to fix a definite date, upon which water carriers must have been in operation, to entitle them without further proof to a certificate or permit. The water carrier provisions were enacted by S. 2009, 76th Cong., 3d sess. In a letter from Commissioner Eastman, Chairman of the Legislative Committee of the Commission, the Conference Committee was asked to insert the "grandfather" date of June 1, 1940, rather than "June 1, 1939," or "on the date of the enactment of this amendatory Act," as found in the House and Senate versions of S. 2009. Omnibus Transportation Legislation, House Committee Print, 76th Cong., 3d sess., pp. 60, 61. The date January 1, 1940, was subsequently chosen by the Conference Committee. H. Rep. No. 2016, 76th Cong., 3d sess., p. 81; H. Rep. No. 2832, 76th

Cong., 3d sess., p. 90. This change of six months in the "grandfather" date indicates that Congress did not contemplate that "grandfather" rights could be established by proof of service in 1935 and before but instead, that Congress, at the Commission's request, carefully selected a particular date.

Moreover, the legislative history of Part III discloses that Congress was modeling it on Part II,¹¹ the motor-carrier portion of the Act, and intended that the interpretations of Part II be followed in interpreting Part III. As Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, stated (S. Rep. No. 433, 76th Cong., 1st sess., p. 4):

The present provisions of the Interstate Commerce Act have been redrafted in what is considered a more logical and orderly manner so as to apply to the newly regulated carriers, saving so far as possible the existing language so that full advantage may be taken of the many interpretations, both judicial and administrative, which have been put upon the respective sections.

¹¹ The following authorities reveal that the permit provisions of Part III were derived from the permit provisions of Part II: S. Rep. No. 433, 76th Cong., 1st sess., p. 27; H. Rep. No. 1217, 76th Cong., 1st sess., pp. 24, 27; Omnibus Transportation Legislation, House Committee Print, 76th Cong., 3d sess., pp. 60, 61; see also appellant's president's testimony at the Hearings, H. Committee on Interstate and Foreign Commerce, H. R. 2531 and H. R. 4862, 76th Cong., 1st sess., pp. 1065-1066.

Decisions in "grandfather" cases under Part II of the Act establish that "grandfather" rights must be strictly construed (*McDonald v. Thompson*, 305 U. S. 263, 266; *Alton R. Co. v. United States*, 315 U. S. 15, 21; *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 480; *Gregg Cartage Co. v. United States*, 316 U. S. 74, 83), and the burden is on the applicant to show plainly that it comes within the "grandfather" clause. *McDonald v. Thompson*, 305 U. S. 263, 266; *Gregg Cartage Co. v. United States*, 316 U. S. 74, 83; *Crescent Express Lines v. United States*, 320 U. S. 401, 409. The phrase "bona fide operation", which is employed in both Parts II and III, was construed in *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 480-481, as follows:

The Act provides the test of "bona fide operation." That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is "actual rather than potential or simulated service" which is required. *McDonald v. Thompson*, 305 U. S. 263, 266. Substantial, as distinguished from incidental, sporadic, or infrequent, service is required.

See also *Alton R. Co. v. United States*, 315 U. S. 15, 21; *Loving v. United States*, 32 F. Supp. 464, 467 (W. D. Okla.), affirmed *per curiam*, 310 U. S. 609; cf. *United States v. Maher*, 307 U. S. 148, 153-154.

Except for the practical differences in characteristics between the two kinds of carriers, a difference which the Commission took into account in the present case (see R. 12), there appears to be no reason why the "grandfather" language in Part III should be given a different meaning than that given to the same language in Part II.¹² Certainly there is nothing in the legislative history, or administrative or judicial decisions that reasonably supports any other view than that the congressional purpose was the same in both Parts. On the basis of only one shipment of steel in 1936, and the vaguely described transportation of other non-exempt commodities 20 to 25 years prior to January 1, 1940, there is no semblance of support for appellant's claim to have been in "bona fide operation" as a contract carrier by water on the "grandfather" date.

The Commission has applied here, although less strictly in view of the nature of water carriage,¹³ the principles applied to "grandfather" motor carriers, requiring operations at a time reasonably

¹² There have been no judicial decisions on this point other than in the instant case. Compare *United States v. Pennsylvania R. R. Co.*, Nos. 47-48 this Term, decided January 29, 1945; *Cornell Steamboat Co. v. United States*, 321 U.S. 634; *Portland Tug & Barge Co. v. United States*, 55 F. Supp. 723 (D. Ore.); *De Bardleben Coal Corp. v. United States*, 54 F. Supp. 643 (D. Pa.). These are the only cases we have found which deal with the Commission's interpretations of Part III, and in all of them the Commission's decisions were upheld.

¹³ See fn. 10, *supra*, p. 23.

approximating the "grandfather" date, and refusing to accept operations several years prior to the "grandfather" date. Among water-carrier cases in which this question was decided is *Federal Materials Company, Inc., Contract Carrier Application*, 250 I. C. C. 149, in which it was held that failure to show operations (other than exempt transportation) from January 1, 1939, to February 31, 1941, precluded a "grandfather" permit under Section 309 (f). A certificate was denied in *Thames River Line, Inc., Common Carrier Application*, 250 I. C. C. 245, 246, in respect to service between two points, where such service was not shown since 1938, more than one year prior to the "grandfather" date, except for one trip between the points in 1941.¹⁴ In *New England Steamship Co. Common Carrier Application*, 250 I. C. C. 184, 185, operations conducted on and prior to 1936 but not since that time, were held too remote to sustain a claim of such operations on January 1, 1940. In numerous cases, "grandfather" certificates and permits have been granted upon proof of operations beginning in the years prior to and extending up to January 1, 1940. In no instance disclosed by the study of a number of decided water-carrier cases has a "grandfather" certificate or permit been granted, based solely

¹⁴ To the same effect are *W. E. Hedger Transp. Corp.*, 250 I. C. C. 753, 755, *Moran Towing & Transportation Co., Inc., Applications*, 260 I. C. C. 269, 275, 277; see also *McLain Caro-*

upon proof of operations more than one year prior to January 1, 1940, and apparently the Commission has in all cases held operations two, three, or more years prior to that date, as too remote to sustain such applications.¹⁵ To establish a different rule herein would disrupt principles which have been universally applied to all water-carrier applications in the four years of regulation, and which have almost universally been accepted by the carriers. In fact, so far as is known, the instant case is the first by an applicant water carrier, seeking a review of the Commission's determination of its "grandfather" rights since the 1940 enactment of Part III.¹⁶

The Commission was here dealing with a new statutory regulation of carriers which had not before been regulated. In interpreting the legislative meaning, it has had the advantage of prior experience, particularly in applying the almost identical motor-carrier provisions of Part II, and the support of judicial standards established by this Court. Accordingly, the Commission's interpretation was entitled to great weight. As was

lina Line, Inc., Common Carrier Application, 250 I. C. C. 327, on which appellant relies (Br. 15).

¹⁵ See cases cited, *supra*, p. 28; see also fn. 14, *supra*, p. 28.

¹⁶ In *Cornell Steamboat Co. v. United States*, 321 U. S. 634, the carrier argued that it was not subject to regulation under the Act or, in the alternative, was subject to regulation as a contract rather than a common carrier. It did not urge that, if subject to regulation, the Commission's determination of its "grandfather" rights was erroneous.

said in *United States v. American Trucking Associations*, 310 U. S. 534, 549:

The Commission and the Wage and Hour Division, as we have said, have both interpreted sec. 204 (a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress.

C. ON THE RECORD, APPELLANT'S CHARTERING OPERATIONS DO NOT ESTABLISH "GRANDFATHER" RIGHTS

Appellant insists that its chartering operations entitle it to a "grandfather" permit (Br. 16-18). However, appellant is here seeking a "grandfather" permit to operate as a contract carrier in the transportation of general commodities. In view of the requirement of Section 309 (g) that a permit specify the "business of the carrier and the scope thereof", and since chartering operations constitute one a contract carrier by water only "as to the vessel so furnished" (sec. 302 (e)), a "grandfather" permit based on chartering operations would confine appellant to chartering opera-

tions (see *C. F. Harms Co. Contract Carrier Application*, 260 I. C. C. 171, 173), and such a permit would not give appellant what it wants and tried to obtain. In any event, we maintain that on the record appellant's chartering operations do not establish any "grandfather" rights. As stated, Section 302 (e) defines those who charter vessels to a non-carrier as "contract carriers by water" as to the vessels so furnished. The Commission consequently recognized (R. 11) that "grandfather" chartering operations entitle a carrier to a "grandfather" permit under Section 309 (f). However, all but two of appellant's chartering operations disclosed by the record (R. 117-126) were evidently exempt from regulation¹⁷ by Section 303 (b) and (d) and Section 303 (g) of the Act (Appendix, *infra*, pp. 45-46). The two non-exempt instances occurred either after the critical date or too long before it to establish "grandfather" rights.¹⁸

¹⁷ A contract carrier engaged in chartering operations is not subject to regulation if the hirer employs the vessels in non-exempt transportation. *Union Sand & Gravel Co. Applications*, 250 I. C. C. 141, 142; *River Sand & Gravel Co. Contract Carrier Application*, 250 I. C. C. 370, 371; *G. M. Cox Shipyard, Inc., Applications*, 260 I. C. C. 20; *W. R. Osborn Applications*, 260 I. C. C. 85. Appellant recognizes this rule (R. 97). Since the Commission may not regulate contract water carriers engaging in exempt transportation, it would be strange if it could regulate them when such transportation is performed via chartering operations.

¹⁸ There were 44 instances of chartering in the more than six years covered by appellant's statement of services from

Furthermore, the Commission may give only that weight to an applicant's evidence as seems proper,¹⁹ and here it held (R. 11) that appellant's evidence of chartering operations was too meager to warrant a finding that appellant, on January 1, 1940, was engaged in chartering operations subject to Part III of the Act. Moreover, the record is barren of information as to the services

January 1, 1936, to August 11, 1942 (R. 117-126). All but two, one in 1936 and one in 1941 (R. 118, 124), had Cairo, Illinois, as destination and origin and therefore would seem to be exempt under Section 303 (g) (Appendix, *infra*, p. 47) as transportation within a single harbor. The first of the two not falling within Section 303 (g) occurred at a date remote from the "grandfather" date of June 1, 1940 (see *supra*, pp. 20-30), and the second occurred after the "grandfather" date; therefore, neither furnishes a foundation for "grandfather" rights. Furthermore, of these 44 charters, the six to the United States Engineers in 1937 (R. 119) are too remote, and nineteen are seemingly exempt under Section 303 (f) (2) since made to other carriers (R. 119, 121, 122-125). Of the remaining nineteen, seven were to steel companies (R. 121-122, 125), three to Standard Oil (R. 126), one to a sand company (R. 123) and one to a cement company (R. 125), indicating probable exemptions under Section 303 (b) and (d); see R. 70, 97. The remaining seven apparently involved only one harbor, Cairo, Illinois, and were exempt under Section 303 (g); the charterers' business and usage of the equipment were undisclosed (R. 117-126).

¹⁹ *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297; *Mississippi Valley Barge Co. v. United States*, 292 U. S. 282; *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 269; *Manufacturers Ry. Co. v. United States*, 246 U. S. 457; *Pennsylvania Co. v. United States*, 236 U. S. 351; *Loving v. United States*, 32 F. Supp. 464, 467 (W. D. Okla.), affirmed *per curiam*, 310 U. S. 609.

rendered, the commodities carried in, or the points served with the vessels during the "grandfather" period, so that the Commission could not here satisfy the mandate of Section 309 (g), which requires that the "business of the carrier and the scope thereof" be specified in permits (*Noble v. United States*, 319 U. S. 88, 91, 92)²⁰ to preserve substantial parity between future operation and prior *bona fide* operations. Appellant now states (Br. 16) that it would be unable to show the nature of the chartering services rendered, the commodities carried in, or the points served with the chartered vessels. However, appellant's president testified at the hearing that the chartered vessels were run with appellant's crews (R. 93-94), that its masters were handed manifests disclosing the cargoes carried (R. 78-79), and that its trip sheets would reveal where the chartered vessels went (R. 84).

Appellant bottoms its chartering argument on *C. F. Harms Co. Contract Carrier Application*, 260 I. C. C. 171 (Br. 16, 17, 18), where the full Commission granted a contract carrier "grandfather" chartering rights without any limitation as to the territory in which the vessels might be used by the hirer. The Commission and Division

²⁰ *Lee Wilson & Co. Contract Carrier Application*, 29 M. C. C. 525; which appellant claims is more applicable to it than the *Noble* case (Br. 19), is inapt, for it dealt solely with non-exempt transportation of a wide variety of commodities (29 I. C. C. at pp. 527, 530-531).

4 had found that, in contrast to the instant case, the applicant had furnished sufficient proof of "grandfather" chartering operations.²¹ The full Commission enlarged the territorial rights granted by Division 4 because it was of the view that a limitation to the territory the hirers had served would not have described applicant's "grandfather" operations as established by its evidence. The case is not inconsistent with the present case. The carrier there had proved that its chartered vessels carried a variety of commodities and that it was not concerned with the nature of the commodities carried by the charterers (250 I. C. C. 685, 687), thereby making it unnecessary for the Commission to limit the applicant's permit to certain commodities in order to describe its business under Section 309 (g). Here there was no showing (see R. 117-126) that appellant's chartering operations were not exempt or that appellant was unconcerned with the nature of the commodities carried by the charterers. All but four of its barges are equipped only for exempt transportation (R. 10, 12; Br. 5). Besides, the applicant in the *Harms* case had proved what type of equipment it used in its chartering operations, so that the Commission was able to limit its operations under Section 309 (g) to the furnishing of non-self-propelled deck scows (250 I. C. C. 685, 687; 260 I. C. C.

²¹ To realize the elaborate proof offered in the *Harms* case, see 250 I. C. C. 513, 514-515.

171, 173). Cf. *Crescent Express Lines v. United States*, 320 U. S. 401, 408-409. In contrast, appellant introduced no evidence of the type of vehicle used in its chartering operations (R. 117-126). And in the *Harms* case, the full Commission held to the rule that "grandfather" rights can only be predicated on a showing of what the carrier "does in bona fide [chartering] operation" on the statutory date (260 F. C. C. 171, 172). Appellant's proof does not show what its chartering operations were on the "grandfather" date (see R. 117-126, 81, 82), and it did not petition the Commission for permission to introduce further evidence after the Commission announced its decision. If this Court thinks that the *Harms* case²² stands for the principle that an applicant for chartering rights need only show the fact of chartering on and after the "grandfather" date and on such showing must be given a permit without restriction as to territory or commodities, we submit that it be disapproved as contrary to Section 309 (f) and (g) and such cases as *Crescent Express Lines v. United States*, 320 U. S. 401, 408-409; *Noble v. United States*, 319 U. S. 88, 91, 92; *United*

²² The *Harms* case was submitted to the full Commission on October 7, 1943, and decided on January 4, 1944. Appellant's petition for reconsideration was filed on August 25, 1943, and denied on December 6, 1943. The Commission apparently thought the two cases distinguishable or it would have granted appellant's petition.

States v. Carolina Carriers Corp., 315 U. S. 475; *Alton R. Co. v. United States*, 315 U. S. 15. See the dissenting opinion of Commissioner Porter in the *Harms* case, in which Commissioners Miller and Rogers joined (260 I. C. C. at pp. 173-174).

Appellant's petition for reconsideration was denied on December 6, 1943, and the *Harms* case was decided less than a month thereafter. Since appellant relies so heavily on that decision, it should have exhausted its administrative remedy by appealing to the Commission on this ground before filing its complaint in court.²³ At any rate, courts are not concerned with the consistency or inconsistency of the Commission's decision in a particular case with ~~prior~~^{other} decisions which it has rendered. *Virginian Railway Co. v. United States*, 272 U. S. 558, 663; *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 271; *Georgia Public Service Commission v. United States*, 283 U. S. 765, 775; cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 602.

²³ See *Yakus v. United States*, 321 U. S. 414, 434; *Natural Gas Co. v. Slattery*, 302 U. S. 300, 310, 311; *Porter v. Investors Syndicate*, 286 U. S. 461, 468, 471; *Board of Railroad Commissioners v. Great Northern Ry.*, 281 U. S. 412, 424; *Great Northern Ry. v. Merchants Elevator Co.*, 259 U. S. 285-291; *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 224; *United States v. Sing Tuck*, 194 U. S. 161, 168; *Carolina Scenic Coach Lines v. United States*, 56 F. Supp. 801, 804-805 (W. D. N. C.), affirmed *per curiam*, December 11, 1944, No. 637, present Term; *Board of Public Utility Com'rs. v. United States*, 21 F. Supp. 543, 549 (D. N. J.); cf. *Chicago, St. P., M. & O. Ry. Co. v. United States*, 322 U. S. 1, 3-4; see also Berger, *Exhaustion of Administrative Remedies* (1939), 48 Yale L. J. 981.

II

THE COMMISSION CORRECTLY DENIED APPELLANT A PERMIT TO CONDUCT NEW OPERATIONS SINCE THERE WAS NO SHOWING THAT THEY WOULD BE CONSISTENT WITH THE PUBLIC INTEREST AND THE NATIONAL TRANSPORTATION POLICY

Besides filing an application for a "grandfather" permit, appellant filed an alternate application for a permit to authorize operations under Section 309 (g), which requires that proposed operations "be consistent with the public interest and the national transportation policy declared in this Act".²⁴ The Commission held that appellant failed to show that such operations "would be consistent with the public interest and the national transportation policy" (R. 13).²⁵ Appellant's president testified at the hearing as follows (R. 66):

That is an application form for a new operation. I never did think it applied to us, but it was, more or less, suggested by the

²⁴ The national transportation policy is set forth in the Appendix, *infra*, p. 45.

²⁵ Appellant was required to make such a showing. *Doyle Transfer Co. v. United States*, 45 F. Supp. 691, 696 (D. D. C.); *Keeler Common Carrier Application*, 32 M. C. C. 567, 568; *Weller Contract Carrier Application*, 31 M. C. C. 202, 204; *Murphy Common Carrier Application*, 29 M. C. C. 787, 788; *Motor Conroy, Inc., Contract Carrier Application*, 2 M. C. C. 197, 201; *House Contract Carrier Application*, 1 M. C. C. 725, 728; *McBroom Contract Carrier Application*, 1 M. C. C. 423, 426.

Bureau of Water Carriers. We filed it as a matter of an abundance of caution and after consulting counsel, we concluded to file it. It seeks rights to operate as an irregular contract carrier over the waters of the Mississippi River and Ohio River systems and their tributaries.²⁶

And appellant now admits (Br. 20) that it is not proposing the establishment of a new operation. Nevertheless, it is insisted that the Commission arbitrarily refused to grant appellant "new" rights.

What is "consistent with the public interest and the national transportation policy" (sec. 309 (g)) is an ultimate question of fact for the expert judgment of the Commission, whose determination thereof will not be set aside if supported by a rational basis and substantial evidence.²⁷ Although the meaning of the quoted phrase and "public convenience and necessity" (sec. 309 (c)) is not identical, both have reference to the public need for adequate transportation.²⁸ In fact, "public inter-

²⁶ See a statement to the same effect by appellant's counsel (R. 65).

²⁷ *Chesapeake & Ohio Ry. v. United States*, 283 U. S. 35, 42; *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 145-146; *McLean Trucking Co. v. United States*, 321 U. S. 67, 87-88; *Davidson Transfer & Storage Co. v. United States*, 42 F. Supp. 215 (E. D. Pa.); affirmed *per curiam*, 317 U. S. 587.

²⁸ *Chesapeake & Ohio Ry. v. United States*, 283 U. S. 35, 42; *N. Y. Central Securities Co. v. United States*, 287 U. S.

est", as found in Section 5 (2) of the Act, was defined in *N. Y. Central Securities Co. v. United States*, 287 U. S. 12, 25, as follows:

* * * the term public interest * * * is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. * * *

See also *Texas v. United States*, 292 U. S. 522, 531; *United States v. Lowden*, 308 U. S. 225, 230; *McLean Trucking Co. v. United States*, 321 U. S. 67, 80-81. And the national transportation policy, among other things, is "to promote safe, adequate * * * and efficient service."

Here there was no evidence by shippers as to any need for new operations by appellant (*D'Agata Contract Carrier Application*, 2 M. C. C. 339, 340), nor was there any showing of inadequacy

12, 25; *North Coast Transportation Co. v. United States*, 54 F. Supp. 448 (N. D. Cal.), affirmed *per curiam*, October 4, 1944, No. 275 present Term; *Carolina Scenic Coach Lines v. United States*, 56 F. Supp. 801 (W. D. N. C.), affirmed *per curiam*, December 11, 1944, No. 637 present Term; *Crichton v. United States*, 56 F. Supp. 876 (S. D. N. Y.), affirmed *per curiam*, January 29, 1945, No. 732 present Term; *Werner Extension*, 9 M. C. C. 267, 268.

of the existing transportation facilities.²⁹ The only evidence that the proposed operations would be consistent with the public interest and the national transportation policy was the fact that appellant had in the remote past been in operation (see R. 116). Appellant cites several decisions³⁰ of the Commission where continuous past operations were considered as an indication that public interest required continuance of such operations, but those cases all involved non-exempt operations. Here, as we have pointed out, no non-exempt operations had been conducted since 1936, except possibly a few insufficiently proved chartering operations. It seems obvious that exempt transportation furnished by the appellant fur-

²⁹In fact, several carriers protested against the proposed operations. (R. 9). Cf. *Grauriller Contract Carrier Application*, 250 I. C. C. 211, 218.

In *Newter Steamship Corporation, Common Carrier Application*, decided January 11, 1945, by Division 4; relied on by appellant (Br. 24), many interests supported the application, and the applicant proved that the general public needed a resumption of the services performed by applicant's predecessor.

³⁰*Reedville Oil & Guano Co. Contract Carrier Application*, 250 I. C. C. 71, 73; *John L. Goss Contract Carrier Application*, 250 I. C. C. 101, 103; *Choctaw Transportation Co. Contract Carrier Application*, 250 I. C. C. 106, 107. It should be noted that these were also Division 4 decisions.

In *Scott Bros., Inc., Collection and Delivery Service*, 2 M. C. C. 155 (Br. 21), the carrier's past operations were non-exempt; the Commission relied too on a phrase in Section 213 of Part II (2 M. C. C. at p. 164) which was repealed by the Transportation Act of 1940, 54 Stat. 898, 924, and carried into the proviso of Section 5 (2) (b) of Part I which proviso is inapplicable to water carriers.

nishes no evidential value that non-exempt transportation by it would be consistent with the public interest, and the national transportation policy. *Atwacoal Transportation Company Contract Carrier Application*, decided February 12, 1945, by Division 4, not yet reported. There is not a scintilla of evidence of any outstanding executory contract for the performance of non-exempt transportation, or any offer of such a contract (cf. R. 97).²¹ This type of evidence is of large importance. *Connors Marine Co., Inc. Contract Carrier Application*, 250 I. C. C. 381, 385. Moreover, the concluding portion of Section 309 (g) reads as follows:

Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his equipment, facilities, or service, within the scope of the permit, as the development of the business and the demands of the carrier's patrons shall require.

The right to "substitute or add contracts" implies the existence of actual contracts (or *bona fide* offers thereof) when the "permit" is issued, and the expression "within the scope of the permit" implies that the Commission shall restrict the

²¹ Four of appellant's barges were available for non-exempt transportation (R. 10, 71, 73), but no evidence was offered that these barges were needed by anybody or that any contract had been made for their use in exempt or non-exempt service.

permit to the type of operations shown by an applicant's contracts." Cf. *Noble v. United States*, 319 U. S. 88; *Crescent Express Lines v. United States*, 320 U. S. 401. Appellant's claim that its past operations alone justify a permit under Section 309 (g) to transport commodities generally, if upheld, would nullify the effect of this proviso.

As stated, Section 309 (g) requires that the "proposed service" of contract carriers be consistent, not only with the public interest, but also with the national transportation policy.³² That policy insists that the Act be administered to "foster sound economic conditions in transportation and among the several carriers" and to prevent "unfair or destructive competitive practices." (See H. Rep. No. 1217, 76th Cong., 1st sess., p. 4.) Despite appellant's protestations (Br. 25), not a word is said herein about regulating contract carriers for the benefit of common carriers. The Commission is not attempting to regulate contract carriers for the benefit of common carriers, but its regulation of any particular type of carrier is in part for the protection of all other carriers, both common and contract. The protection intended for all carriers would be abrogated if a carrier should, as appellant claims, receive a permit to transport commodities generally, without regard for whether the existing services of other carriers are adequate to meet the de-

³² Common carriers need only show public convenience and necessity. Section 309 (c).

mands of the public. Cf. *McLean Trucking Co. v. United States*, 321 U. S. 67, 82-85. The Commission could not here find that appellant's "proposed service" would be consistent with the public interest and the national transportation policy, for appellant did not furnish any evidence as to "proposed service". Consequently, the Commission could not judge the effect of a new operation on the public interest and national transportation policy. It would not "foster sound economic conditions" within the national policy to grant a "new" permit to appellant, when so far as shown by the record, there is no public need for such service. Cf. *C. & D. Oil Co. Contract Carrier Application*, 4 M. C. C. 329, 332.

The Commission pointed out (R. 12) that though appellant's present exempt petroleum movement is an emergency operation occasioned by the war, even considering its normal operation for a period of approximately five years before the war, there was no showing of non-exempt transportation except for the one shipment of fabricated steel and piling in 1936. Certainly under these circumstances there was a rational basis in the record for the Commission's conclusion that appellant's past operations did not establish that for it to engage in wide scale non-exempt operations would be in the public interest.

Appellant urges (R. 7, 32; see Br. 20) that the Commission erred in overruling the trial examiner's recommendation that a permit for new

operations under Section 309 (g) should be issued. Congress has vested the authority to make decisions in the Commission rather than in its examiners, and the Commission may reject any conclusions of its examiners which it deems erroneous. *Baltimore & Ohio Railroad Co. v. United States*, 298 U. S. 349, 370-371; cf. *Federal Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 285-286; *National Labor Relations Board v. Botany Worsted Mills*, 133 F. 2d 876 (C. C. A. 3), certiorari denied, 319 U. S. 751.

If it files another application under Section 309 (g) at such time as it may actually contemplate engaging in transportation of the sort for which authority is required, appellant will be given opportunity to present evidence that its proposed operations would be consistent with the public interest and the national transportation policy.

CONCLUSION

For the foregoing reasons, the decree of the district court should be affirmed.

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MARCH 1945.

APPENDIX •

The National Transportation Policy, as set forth in the Transportation Act of 1940, is as follows (54-Stat. 899):

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Part III of the Interstate Commerce Act, as enacted by the Transportation Act of 1940, 54 Stat. 898.

Section 302 (e) provides in part:

The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of "contract carrier by water".

* * * (49 U. S. C. 902 (e).)

Section 303 (b) provides in part:

Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities.

* * * (49 U. S. C. 903 (b).)

Section 303 (d) provides:

Nothing in this part shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service and certified under regulations approved by the Secretary of Commerce pursuant to the provisions of section 4417a of the Revised Statutes (U. S. C., 1934 edition, Supp. IV, title 46, sec. 391a): (49 U. S. C. 903 (d).)

Section 303 (g) provides in part:

Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary to carry out the national transportation policy declared in this Act, the provisions of this part shall not apply (1) to transportation in interstate commerce by water solely within the limits of a single harbor * * *. (49 U. S. C. 903 (g).)

Section 309 (f) provides:

Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: *Provided*, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such appli-

eration, the continuance of such operation shall be lawful. If the application for such permit is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (g), and such permit shall be issued or denied accordingly. Any person, not included within the provision of the foregoing proviso, who is engaged in transportation as a contract carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a permit, and, if application for such permit is made to the Commission within such period, the continuance of such operation shall be lawful pending the determination of such application. (49 U. S. C. 909 (f).)

Section 309 (g) provides:

Application for such permit shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require. Subject to section 310, upon application the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in this Act. The business of the carrier and the scope thereof shall

be specified in such permit and there shall be attached thereto at time of issuance and from time to time thereafter such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier by water, as are necessary to carry out the requirements of this part or those lawfully established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his equipment, facilities, or service, within the scope of the permit, as the development of the business and the demands of the carrier's patrons shall require. (49 U. S. C. 909 (g).)

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 630.

THE BARRETT LINE, INC., *Appellant,*

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, *Appellees.*

On Appeal from the District Court of the United States for
the Southern District of Ohio.

BRIEF ON BEHALF OF AMERICAN BARGE LINE
COMPANY, UNION BARGE LINE CORPORATION,
MISSISSIPPI VALLEY BARGE LINE COMPANY,
AND CAMPBELL TRANSPORTATION COMPANY,
INTERVENORS.

WILBUR LA ROE, JR.,

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March, 1945.

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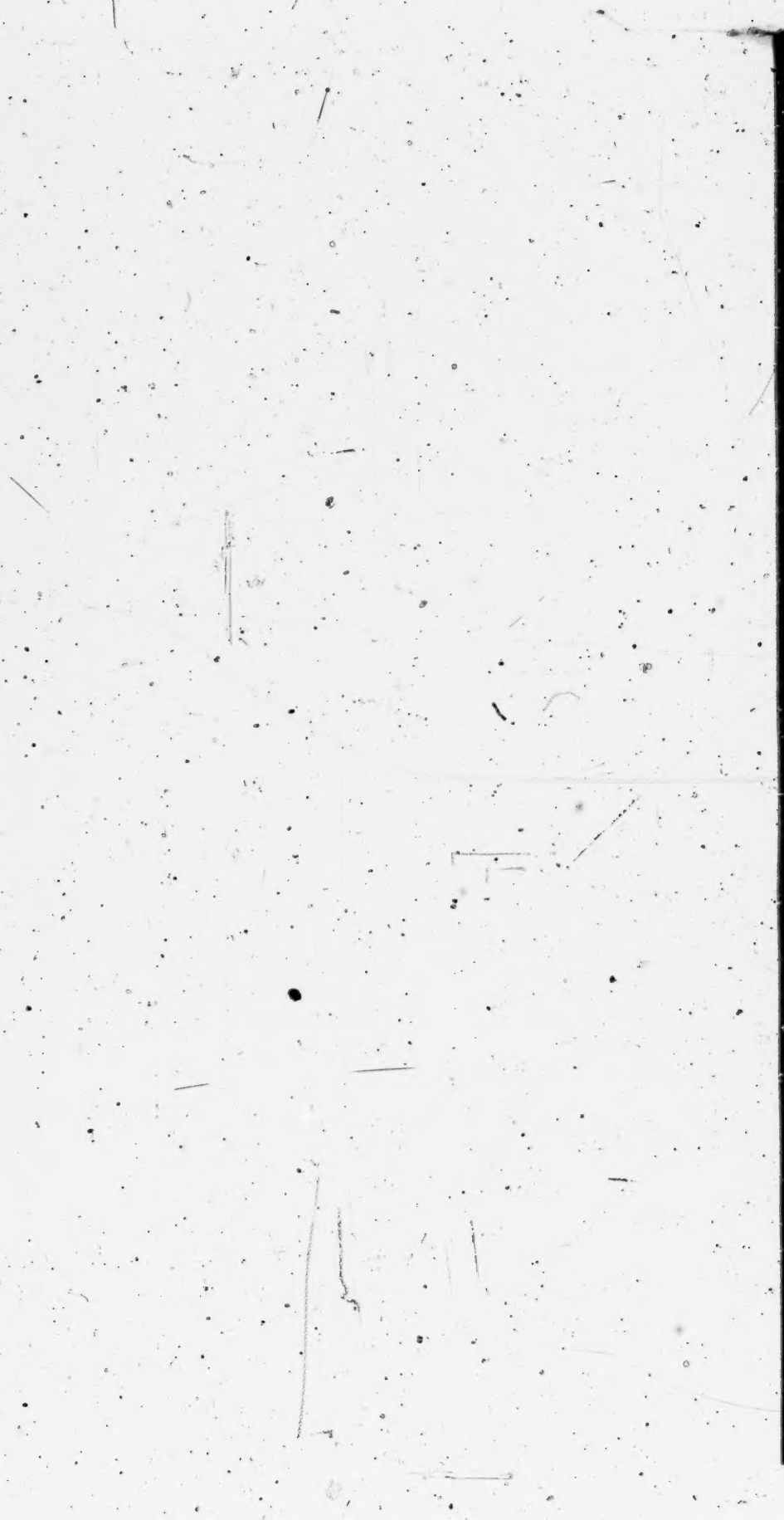
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**BRIEF ON BEHALF OF AMERICAN BARGE LINE
COMPANY, UNION BARGE LINE CORPORATION,
MISSISSIPPI VALLEY BARGE LINE COMPANY,
AND CAMPBELL TRANSPORTATION COMPANY,
INTERVENORS.**

JURISDICTION.

The final decree of the three-judge district court was entered on July 28, 1944 (R. 29). Petition for appeal was presented and allowed on September 15, 1944 (R. 30-33). This court entered its order noting probable jurisdiction December 4, 1944 (R. 149).

STATUS OF INTERVENORS AND THEIR INTEREST IN THE SUBJECT MATTER IN DISPUTE.

Intervenors American Barge Line Company, Union Barge Line Corporation, Mississippi Valley Barge Line Company, and Campbell Transportation Company are all common carriers by water operating on certain sections of the Ohio and Mississippi Rivers and tributaries thereof.

Intervenors, and each of them, would be in competition with plaintiff on a substantial portion of the waterway system on which operating rights are sought. Union Barge Line Corporation, Mississippi Valley Barge Line Company, and Campbell Transportation Company intervened in and have been parties to the proceeding before the Commission from its inception and are entitled "as of right" to participate in this suit.

American Barge Line Company intervened in the proceeding before the Commission for the purpose of filing exceptions to the proposed report of the Examiner and participating in oral argument. Its request for intervention was granted by the Commission; it filed its Exceptions and participated in the oral argument.

The position of American Barge Line Company, and its competitive relation with respect to the operating authority sought by plaintiff is precisely the same as, if indeed not greater in intensity and scope, than that of its co-intervenors, in that it operates on a greater number of waterways which would be competitive with the applicant.

STATUTES INVOLVED.

The statutes directly involved are sections 302(e), 303(b), 303(d), 309(f) and 309(g) and these, with the exception of section 303(d), are reproduced in full in the appendix of appellants Brief herein. Other sections will be referred to as may be necessary in treating the issue.

THE PROCEEDINGS BEFORE THE COMMISSION.

This is an application under the Interstate Commerce Act of 1940, for (a) permit to continue operations as a contract carrier on the Ohio and Mississippi Rivers and all tributaries thereof, under the so-called "grandfather" clause; (b) an application for authority as for a "new" operation over the waterways described; and (c) an application for authority to continue operations as a contract carrier in the "furnishing of vessels."

In respect of the application under the "grandfather" clause the Commission found:

An exhibit of record contains a description of all services performed between January 1, 1936, and August 11, 1942. During this period practically all services performed were such that they may be continued *without any authorization from us* because they are *not subject to regulation under part III of the act*. Stone, in bulk, petroleum products, in bulk, and fabricated steel and steel piling were the only commodities carried. Practically all of the stone was transported for the United States Army Engineers between points in Missouri, Illinois, Kentucky, Arkansas, and Tennessee and was used for construction work on the waterways. The transportation of bulk commodities is exempt from regulation under section 303 (b). There were 7 movements of petroleum products in 1937 from Baton Rouge, La., to Louisville, Ky.; 3 movements in 1941, 1 from Vicksburg, Miss., to Grand Tower, Ill., 1 from Cairo to Alton, Ill., and 1 from Wycliff, Ky., to Nashville, Tenn.; and 8 movements in 1942 from points in Louisiana to Midland, Pa., North Bend, Ohio, and Memphis, Tenn. The transportation of petroleum, in bulk, is exempt under the provisions of section 303 (b) or (d). One shipment of fabricated steel and piling was handled in 1936 from Cairo to Genoa, Wis. *There has been none since*. In one instance a contractor's fleet of work boats was moved which operation was probably exempt by our order of October 29, 1941, in Ex Parte 147, *Towage of Floating Objects*.

Applicant maintains that owing to the varying and sporadic nature of its operation it is impossible to

select any limited period of its existence as representative of its business. It claims to have handled a variety of commodities in the past, such as scrap iron, pig iron, fabricated iron and steel, ties, pipe, sulphur, coal, logs, lumber, salt, grain, sand, gravel, cement, paving blocks, automobiles, and bauxite ore, and seeks authority to handle commodities generally so that it will be in a position to again handle these or or similar commodities should the occasion arise.

Under the act "grandfather" rights must be predicated upon a showing of bona fide operations on January 1, 1940, and continuously since. The term "bona fide operations" has been interpreted to mean a holding out substantiated by actual operations consistent therewith. Actual operations in order to substantiate a claimed holding out on January 1, 1940, must have been within a reasonable length of time from that date. What constitutes a reasonable length of time may vary with the particular circumstances in each proceeding but one shipment made in 1936 and others at an indefinite period of time prior thereto are entirely too remote to establish bona fide operations on January 1, 1940, and continuously since. We conclude that applicant has failed to establish that it was in bona fide operation on January 1, 1940, and continuously since, in the performance of transportation subject to part III of the act. (Italics ours.)

In respect of the application as for "new" operating rights the Commission found:

Applicant, however, is *not proposing any new operation*. In fact, most of its equipment at present is being used in the transportation of bulk petroleum products. We recognize the fact that this present petroleum movement is an emergency operation occasioned by the war but even considering applicant's normal operations for a period of approximately 5 years before the war it has not shown that its operation consisted of performing other than exempt transportation, except for the one shipment of fabricated steel and piling in 1936. *No evidence was submitted to show that present or future public convenience and necessity require operation by applicant in the performance of trans-*

portation subject to the act. On this record we conclude that applicant *has failed to show that it is proposing any new operation*, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity require such operation. (Italics ours).

In respect of the application for rights as a "furnisher of vessels" the Commission found:

Other services rendered during the period in question consisted of towing for other carriers or for shippers of bulk commodities, chartering vessels to carriers or to shippers, salvage operations, storage of vessels belonging to others, and furnishing steam to other vessels for boiler cleaning operations. Of the foregoing the only transportation which might be subject to regulation under part III was that of chartering vessels to shippers. However, no showing is made as to the nature of the services rendered, the commodities carried in, or the points served with such vessels. On such meager showing we would not be warranted in finding that applicant, on ~~January 1, 1940~~, and continuously since, was engaged in chartering operations subject to part III of the act.

THE RANGE OF JUDICIAL REVIEW OF AN ORDER OF THE COMMISSION.

As pointed out in *Rochester Telephone Corp. v. United States*, 307 U.S. 125 at 139, 140:

Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised. If these legal tests are satisfied the Commission's order becomes incontestable. *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission v. Union P. R. Co.*, 222 U.S. 541.

ARGUMENT.

I.

There Was a Rational Basis For the Findings of the Commission.

The "grandfather" clause.

Under the "grandfather" clause (Section 309 (f)) the Commission was bound to deny the application if, on the critical date—January 1, 1940—and continuously since, the applicant had not been in bona fide operation in connection with the transportation of commodities made subject to regulation. In this case it found from the applicant's own exhibit (R. 118-126) covering its entire operations for the period from 1936 to 1942, inclusive, that it had engaged in but one movement of a regulated commodity¹ and as to that it properly found that:

One shipment made in 1936 and others at an indefinite period prior thereto are entirely too remote to establish bona fide operations on January 1, 1940, and continuously since. (Italics ours.)

On behalf of applicant it is urged that since the definition of a contract carrier in section 302 (e) of the act² contains

¹Fabricated steel in 1936 (R. 119).

²"Sec. 302 (e). The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

"The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in the transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'."

no mention of exempted transportation (or commodities) a permit must be issued under the "grandfather" clause if an applicant was functioning as a contract carrier irrespective of the question whether on the critical date it was handling transportation (commodities) subject to the act.

This contention, if sustained, would have the effect of reading the exemption provisions out of the act.

When Congress enacted the Interstate Commerce Act of 1940, it took pains to exempt from all regulation (and hence from the jurisdiction of the Commission) certain commodities or activities. In par. (b) of section 303 it exempted commodities handled in bulk;³ in par. (c) it exempted bulk commodities handled on the Great Lakes; in par. (d) it exempted liquid commodities in bulk in tank vessels; in par. (e) it exempted certain transportation if and when the Commission should find that such transportation "by reason of its inherent nature", etc, is not substantially competitive with transportation performed by common carriers under Parts I, II, or III of the act; in par. (f) it exempted certain services such as towage when performed by an agent under arrangement with the principal carrier; in par. (g) it exempted transportation within harbor limits and in small craft; in par. (h) it exempted private carriage under the conditions stated; in par. (j) it saved to the States exclusive jurisdiction over intrastate transportation.

The exemptions relating to commodities were all prefaced by the statement that "Nothing in this part shall apply to . . ." and the jurisdictional character of the exemptions was carefully explained by Representative Bulwinkle, one of the sponsors of the Bill, during the debates in the House. At p. 13612, Congressional Record, July 22, 1939, this statement appears:

"Subsections (b) and (c) are unqualified exemptions, and the carriers exempted are not required to apply to the Commission for exemption. These exemptions are written in terms of the transportation engaged in, so

³The exemptions are quoted in full in the Appendix hereto.

that *any other transportation* which the carriers may engage in will be subject to such regulation as may be provided for: (Italics ours).

In the light of these specific exemptions the Commission would commit a vain act if it were to grant a permit on a showing that an applicant, on the critical date, had performed nothing save transportation exempted from all regulation. In *Upper Mississippi Towing Corp., Application*, 260 I. C. C. 292, the entire Commission, on reconsideration, affirmed the denial by Division 4 of a certificate of public convenience and necessity under the "grandfather" clause on the ground that the applicant therein, on the critical date, had performed nothing but exempt transportation. At p. 293 of its opinion the Commission stated:

The purpose of the "grandfather" clause was to assure those to whom Congress had extended its benefit a substantial parity between future operations and prior bona fide operations; *Alton R. Co. v. United States*, 315 U. S. 15. With this guide before it, the division might have found that applicant was a common carrier of liquid cargoes, in bulk, in tank vessels, and as a tow in the performance of towage for other water carriers, subject to part III. That would have availed applicant nothing; however, as no certificate *could be issued* to authorize such activities because the provisions of part III *do not apply* to transportation services of those types, by reason of the exemptions in section 303(b), (d) and (f) (2). (Italics ours.)

Of similar import are its decisions in *McCarren Towing Line Application*, 250 I. C. C. 168, 169; *Ralph Raiké Applications*, 250 I. C. C. 177, 178; *Bronx Towing Line, Inc.*, 250 I. C. C. 614, 615; *Canal Lakes Towing Corporation*, 250 I. C. C. 621, 625, 626; *Eddie Erlbacher Application*, (Mimeo-graphed report of November 3, 1942—not printed) and many others.

A decision of the Commission if based on substantial evidence and made within the framework of the statute is binding upon the Courts. As pointed out in *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 481:

As we indicated in *Alton R. Co. v. United States*, supra, the purpose of the "grandfather clause" was to assure those to whom Congress had extended its benefits a "substantial parity between future operations and prior bona fide operations." We cannot say that that was denied in this case, if the limitations on the territorial scope of the operations are alone considered. While service to and from all points in the States included in the application was not allowed, the reduction was determined by the standard of substantiality of service. And consideration was given to the characteristics of irregular route carriers and their role in the national transportation system. That involved a weighing of specific evidence in light of the complexities of this transportation service. The judgment required is highly expert. Only where the error is patent may we say that the Commission transgressed. That is not true in this case.

In the denial of a permit to an applicant who performed nothing save exempted transportation on the critical date the "substantial parity between future operations and prior bona fide operations" there spoken of is completely preserved because such an applicant is free to continue, without regulation, the precise pattern of his past operations. What this applicant seeks, of course, is an interpretation of the "grandfather" clause which would confer upon it authority in perpetuity to conduct an entirely new and different type of operation without the proof of "consistency with the public interest" which the statute requires as to such operations.

The Application as for New Rights.

The Commission correctly appraised the application as for "new" rights when it said:

Applicant, however, is not proposing any new operation. (R. 12).

and

On this record we conclude that applicant has failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity require such operation. (R. 12).

Filed, as stated, out of an "abundance of caution" (R. 66) it was not supported by any evidence that appellant intended to enter into any new operation or by the testimony of any prospective users of any new operation. At the conclusion of his presentation of the "grandfather" case counsel for appellant stated (R. 115, 116):

That is applicant's case. The applicant rests. We have no other witnesses. * * * We think the evidence, showing the fact that these people have operated for one hundred years, shows that the service is needed and that it would be consistent with the public interest.

Previously (R. 114) applicant's counsel had asked this question:

⁴The following is taken from the hearing before the Commission:

Q. What does BWC 3 seek?

A. That is an application form for a new operation. I never did think it applied to us, but it was, more or less, suggested by the Bureau of Water Carriers. We filed it as a matter of an abundance of caution and after consulting counsel we concluded to file it. It seeks rights to operate as an irregular contract carrier over the waters of the Mississippi River and Ohio River systems and their tributaries.

Q. (By Mr. Quirk) Now, as to these general commodities you have been asked several times, Mr. Barrett, about what you wanted. This is a leading question but I think it is pardonable. Is not what you want authority to do what you have always done?

A. (By Mr. Barrett) Exactly.

The Application for Rights as a "Furnisher of Vessels".

As we have shown, the Commission denied this phase of the application because there was no showing as to what the vessels carried, where they went, or the nature of the services performed with them.

Appellant is now contending that the Commission erred in this conclusion and its support for that contention is the third decision rendered by the Commission in *C. F. Harms Company, Contract Carrier Application*, 260-I. C. C. 171.

In any appraisal of this particular feature of the Commission's decision and its possible bearing upon the issues here presented, it should be helpful to consider first of all the essential difference between the conventional "contract" carrier which is an actual carrier or transporter of property and which is covered by the first paragraph of subparagraph (e) of section 302, on the one hand, and the "contract" carrier embraced in the second paragraph which is made such only by virtue of "furnishing" a vessel "to a person other than a carrier."

When the Commission, as in the *Harms Case*, *supra*, grants a permit to a "furnisher of vessels" under the second paragraph of section 302(e) it runs to what it describes as a contract carrier in the furnishing of vessels (under charter, lease, or other agreement) to persons other than carriers subject to the Interstate Commerce Act. (Emphasis supplied).

When it issues a "permit" to a contract "carrier", as distinguished from a "furnisher of vessels", it runs to what is described as

a contract carrier by non-self-propelled vessels with the use of separate towing vessels, (or self-propelled vessels, as the case may be) in the transportation of (certain specified commodities). (Parentheses added)

Legislative History.

The House version of the Bill (S. 2009) which, as amended, finally became the Interstate Commerce Act of 1940, underwent debate without passage in 1939. At that time the sub-paragraph as to the "furnisher of vessels" read:

For the purposes of this paragraph a person which, under a charter, lease, or other agreement, furnishes a vessel to another person, for compensation, for use in the transportation of property of such other person, shall itself be considered *to be engaged in the transportation of such property as a contract carrier by water.* (Italics ours).

It will be noted that, under that definition the "furnishing" was to *any* "person" and not "to a person *other than a carrier.*" It will be noted, also, that the "furnisher" was put under regulation as though "*engaged in the transportation*" of the property.

In that form the bill met vigorous opposition. Addressing himself to it at p. 13515 Congressional Record, July 21, 1939, Representative Wadsworth said:

It is provided here that if the owner of a barge or of a vessel charters that barge or vessel to another carrier, he, the owner, is still subject to this Transportation Act and all its regulations. Of course, that is not true with respect to a railway. A railway can lend its engines or its cars to another railroad and there is no responsibility thereafter for the operation of those cars or engines, but under this act, and it is rather cleverly put in, the charterer is subject to this act as *engaging in transportation.*

Mind you, this chartering is done in thousands of cases on the waterways and in coastal traffic. This bill proposes to upset it.

Let me illustrate what it does. A well-known, independent lumber dealer of the East came to me the other day and called my attention to the effect this would have upon the lumber industry. He said:

We get large supplies from the Pacific Northwest. We do not own any steamers. We have to send out to the Northwest and when we purchase or contract to purchase a cargo of lumber, we charter a vessel from an owner out there, and under a contract with him, we bring it around through the Canal and up the Hudson River to Poughkeepsie, N. Y.

Under this bill the owner of that vessel is subject to the Transportation Act. What will happen? He will not charter it. How can you expect him to be responsible for compliance with this law when he charters his vessel to another? Under such conditions he will not charter his vessel to another. Today this chartering goes on all the time, not only in the intercoastal but the coastal and inland waterway business. It is an element of that flexibility which distinguishes commerce by water, and yet this bill would throttle it.

In the debate of July 25, 1939 (Congressional Record p. 13918) Representative Kitchens proposed an amendment which in abridged form made the definition read:

*** a person which *** furnishes a vessel *** shall itself *not* be considered to be engaged.

and the amendment was adopted on July 25, 1939.

The "extended" remarks of Mr. Kitchens on his amendment *and the acquiescence therein of Chairman Lea* of the House Committee on Interstate Commerce, are interesting. They are reported at p. 14128 of Cong. Rec., July 26, 1939. Mr. Kitchens stated:

Mr. Chairman, most barge line operations are more or less seasonal. It is a common practice of every barge line, when its particular business is dull, to lease a number of its barges to some other operator or shipper during the dull season. The same is done with towboats. Surplus equipment is freely leased for long and

short periods of time under an open market which has been developed in certain navigation centers.

This bill would absolutely destroy this practice by contract carriers in that it specifically provides as to contract carriers that wherever any person leases or charters any equipment such as barges, towboats, or other vessels to another person for use in the transportation of the property of such person *it becomes a carrier engaged in the transportation of the property* and subject to all of the regulations set forth in the act. That this is utterly unfair is best illustrated by the fact that no such provision exists in the law today with respect to facilities of railroad carriers and motor carriers. Railroads have always been free to lease surplus equipment without such leases or such operations becoming subject to the jurisdiction of the Interstate Commerce Commission. It is a common occurrence for industrial plants to lease locomotives and other equipment of railroads and for railroads to lease such equipment to one another. However, when it comes to providing regulation for water carriers this bill imposes such onerous restrictions upon it as to make this practically impossible in their case.

For example, a barge line may want to lease a towboat to some private company for a period of six months. Under this law it would automatically become a carrier subject to regulations *as to the property which may be carried for such company*. It would be responsible for the operations and its charges for leasing the equipment would be subject to regulation by the Commission. If it should lease the towboat to another carrier it would apparently be responsible for the acts of such carrier. The bill is capable of interpretation to the effect that the charges of the lessee for performing these services and responsibility for its operations would also be the responsibility of the lessor. This is done by the language in sections 302(d) and (e). (Emphasis ours).

To which Chairman Lea replied:

I will state to the gentleman that I have no objection to his amendment. I concede that this provision as it

stands goes too far and the gentleman's amendment will help to adjust it.

The bill did not pass the House in 1939, and when it was resubmitted by Chairman ~~Lea~~ with his Conference Report of April 26, 1940 (Report No. 2016) the word "not" to which he had agreed in 1939, had been stricken but the definition had been considerably changed otherwise. It was made to read precisely as it was finally enacted into law and as we have quoted.

In his Conference Report (Ibid p. 77) the Chairman explained the change as follows:

The definition of "contract carrier by water" in the House amendment contained a sentence as follows:

For the purposes of this paragraph a person which, under a charter, lease, or other agreement, furnishes a vessel to another person, for compensation, for use in the transportation of property of such other person, shall itself *not* be considered to be engaged in the transportation of such property as a contract carrier by water.

In the conference substitute the word "not", which was inserted on the House floor, has been omitted, but the provision (which is in sec. 302(f)) has been limited so that it only applies where the vessel is furnished to a person *other than a carrier* subject to the Interstate Commerce Act, and the language is clarified to make sure that the person furnishing the vessel will not, *simply by reason of furnishing the vessel*, become a contract carrier subject to part III of the act *as to that part of its business not related to the furnishing and use of the vessel*. A new provision is added giving the Commission authority to exempt (either permanently or for a limited time) any person or class of persons when the Commission deems it unnecessary, in order to effectuate the national transportation policy, for such person or class of persons to be regulated as a contract carrier or contract carriers. (Italics ours).

In recognition of the essential difference between the two types of service or authority the Commission consistently

refuses to grant both types, of authority to a single applicant except under the requirements of section 310⁵ of the act which contemplates dual operating authority. (*Hyer Towing Co. Contract Carrier Application*, 250 I. C. C. 631; *Shamrock Towing Co., Inc., Contract Carrier Application*, 250 I. C. C. 788.)

We point out these differences in order to make it clear that even if the Commission erred in disposing of that portion of the application relating to the "furnishing of vessels" such error would have no effect upon its conclusions as to the conventional type of contract carriage covered by the first paragraph of section 302(e).

The Decisions in the Harms case.

Three decisions have been rendered by the Commission in the *Harms Case*. In its first decision in that case (250 I. C. C. 513) the Commission (Division 4) gave to Harms a very limited authority, viz., to furnish "non-self-propelled vessels * * * to be used in the transportation of scrap iron between ports and points on Long Island Sound, the Hudson River, and the area defined by our order of March 26, 1941, Ex Parte 140."

In that proceeding applicant urged that "the operations were performed by the *users* of the vessels and not by itself" and that it should have a permit "without limitations upon

⁵Which reads:

"(1) no person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier by water if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier by water; and

"(2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier by water if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier by water.

the scope of the transportation performed *by the vessels.*" To which Division 4 replied at p. 516:

This construction of section 309 would require that no limitations be imposed upon the scope of the operations of *furnishers* of vessels, but that other contract *carriers* be limited to operations between the ports or over the routes served on and since the statutory date. (Emphasis supplied).

The decision of Division 4 was appealed on petition and in a report on reconsideration (250 I. C. C. 685) the Division removed the limitation as to the commodities which could be transported in the leased vessels and granted authority to furnish "non-self-propelled deck scows for the transportation of any kind of property." It kept in force, however, the *territorial* limitations within which the scows could be used, viz., "between ports and points on Long Island Sound, the Hudson River, and the area defined in our order of March 26, 1941, in Ex Parte No. 140."⁶

The decision was again appealed and in a final report by the entire Commission (260 I. C. C. 171) the "territorial" limitations were removed. The report recites:

Applicant on January 1, 1940, and continuously since, has held itself out to hire its vessels to anyone for any use for which they were suited without limitation as to the commodities to be transported or the place or places to which they were to be moved. It claims, therefore, that the permit to which it is entitled under the so-called grandfather clause of the statute would permit it to continue the carrier business in which it was engaged on and since the statutory date. It further claims that the limiting of its permit to defined territory based upon the use to which the hirer of its vessels used them on and since the statutory date restricts its business materially and prevents it from continuing the operations in which it was engaged and in which it continuously has been engaged. We conclude that the claims of

⁶In which latter proceeding the Commission had defined the limits of New York Harbor.

applicant are well grounded. The territorial limitations imposed by the permit issued April 14, 1943, are not warranted and should be removed.

It will thus be seen that applicant Harms was granted rights to furnish deck-seows without regard to the nature of the commodity to be loaded into them and without regard to the territory in which they are to be used, whereas appellant here has been denied rights as a "furnisher of vessels" because it did not show—

the nature of the services rendered, the commodities carried in, or the points served with such vessels (R. 11).

II.

Appellant Has Not Exhausted Its Remedy Before the Commission With Respect to the Matter of Chartering Rights.

The statutory provision which creates a novel type of "contract carrier" out of a "furnisher of vessels" does not contain within itself any limitations as to territorial or commodity coverage. The question of law or statutory construction as to whether the definition or the authority to be granted under it is subject to and qualified by the exemption provisions to which we have referred is one which will become resolved into settled law only through the decisions of the Commission or of the Courts in the Commission, upon judicial review, is found to have misconstrued the statute.

Thus far the Courts have not passed upon the question. The Commission apparently regards as settled law, at the moment, its third decision in the *Harms Case*. If applicant felt that the final disposition of the *Harms Case* was contrary to the disposition of its case it should have petitioned the entire Commission for reconsideration. This it has not done.

In this connection it is significant that when appellant petitioned on August 25, 1943 (R. 14 to 25, incl.) for recon-

sideration of the decision of Division 4 it made no mention of the matter of "chartering" rights and did not express itself as aggrieved by the denial of such rights. The Commission (Division 4) had rendered its second opinion in the *Harms Case* on April 14, 1943,⁷ in which, as stated, it had removed the "commodity" limitations with respect to the permit granted.

It is well settled that an appellant before this Court must show that it has exhausted its remedy before the administrative tribunal it seeks to have overturned. *Prentis v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 232.

III.

The Type of Authority Which Applicant Seeks as a Carrier of Property Is Virtually Unknown to the Law.

The authority which this applicant seeks is that of a contract carrier of commodities generally. The very essence of contract carriage stamps it as a specialized or individual type of undertaking. The definition so characterizes it. It is a carrier which engages in transportation "under individual contracts or agreements." And under that characterization it is set apart from the common carrier which serves patrons and handles commodities indiscriminately. Indeed, if the one which asserts itself to be a contract carrier is not an actual party to an executory "individual contract or agreement" (or, in the case of one which aspires to be a contract carrier in the future, at least to a prospective or firm offer of such agreement) it would seem impossible to assign to it a separate place in the category of "carrier" or in the transportation system.

On the critical date—January 1, 1940—this applicant had two executory contracts. Both contemplated the transportation of a bulk commodity—stone—and appellant's wit-

⁷The last decision in the *Harms Case* was on January 4, 1944, after the appellants' petition was filed but prior to the argument in the court below.

ness conceded at the hearing (R. 97) that it had "not handled any stone in the last two years." Appellant, therefore, was naked of any "individual contract or agreement" covering transportation regulated by the act. Yet on that showing it is insisting that the Commission must not only grant it a permit as though it *had* performed regulated transportation, but that the permit must cover every conceivable commodity.

As shown, in respect of its application as for "new" rights, appellant introduced no "individual contract or agreement" for transportation subject to the act or any offer of one. Yet on that showing or lack of showing it insists that the Commission should have given it a permit to handle commodities generally, over the entire inland river system.

The instances are rare, indeed, in which the Commission has granted authority to a *contract* carrier to handle commodities generally. And in every one of such instances it has found that the applicant so treated *had actually handled general commodities*. In *Willis Contract Carrier Application*, 250 I. C. C. 179, the applicant was given authority to handle "commodities generally" to New Bern, N. C., because its consignee there was a "wholesaler of general merchandise" and because

Authority to transport general commodities is (was) essential in order for applicant to meet the needs of this party. (Parentheses added)

The Commission's report (p. 180) further shows that the "party" had been served by the applicant since 1933. Moreover, the authority was limited so as to cover two origin points only (Baltimore, Md., and Norfolk, Va.). In all other respects the applicant was given a permit only for specific commodities between specific ports.

Another exception in which a "permit" for the handling of general commodities was issued to a contract carrier was in *Universal Transp. Co., Contr. Car. Appns.*,

250 I. C. C. 737, but the authority was limited to transportation "*for the United States*" for whom the applicant for some years had transported salvaged or used materials of a general nature.

The only other instance in which a contract carrier by water has been granted authority to transport commodities generally is in a decision dated February 12, 1945 (not printed) in *Atwacoal Transportation Company Contract Carrier Application*, but there again, the decision contains a recital that—

Applicants in the past have not limited their service to the handling of specific commodities and have in fact handled a wide variety of articles. (Emphasis supplied).

In all other cases, although the applicants requested authority for general commodities the permits have been limited to specific commodities *actually handled*.^{*} No such authority has been granted in any situation where, as here, there is no showing that *general* commodities have been actually handled by an applicant.

^{*}Thus *Reedville Oil & Guano Co.*, 250 I.C.C. 71 (commodities used by fish processing plants); *John L. Goss Corp.*, 250 I.C.C. 101; 250 I.C.C. 485 (granite); *Choctaw Trans. Company*, 250 I.C.C. 106 (forest products and logging equipment); *Pope & Talbot, Inc.*, 250 I.C.C. 117 (iron and steel products and specified related commodities); *Oliver J. Olson & Co.*, 250 I.C.C. 151 (lumber and lumber products); *Horace X. Baxter S. S. Co.*, 250 I.C.C. 162 (same); *W. H. Wood*, 250 I.C.C. 165 (same); *Wood Towing Corporation*, 250 I.C.C. 170 (logs); *Beardslee Launch & Barge Service*, 250 I.C.C. 173 (poles and piling); *Schafer Bros. S. S. Lines*, 250 I.C.C. 187, 250 I.C.C. 353 (lumber and lumber products); *A. B. Johnson Lbr. Co.*, 250 I.C.C. 200 (same); *Chamberlin Cont. Car. Application*, 250 I.C.C. 226 (same); *West Coast S. S. Co.*, 250 I.C.C. 235 (same); *United States Lighterage Corp.*, 250 I.C.C. 347 (lumber and piling); *Dorothy Philips S. S. Co.*, 250 I.C.C. 391 (lumber and lumber products); *E. K. Wood Lbr. Co.*, 250 I.C.C. 499 (same); *Lend-ten Cont. Car. Appn.*, 250 I.C.C. 519, 260 I.C.C. 189 (certain lumber products); *Kahlke Contr. Car. Appn.*, 250 I.C.C. 617 (construction materials); *Curlett Cont. Car. Appn.*, 250 I.C.C. 700 (lumber and fertilizer materials).

To the same general effect have been the decisions of the Commission under Part II of the act. That is to say, no contract carrier has been authorized to haul *general* commodities except upon a positive showing that it had in the past handled such a wide and diversified list of commodities that no practical limitation could be applied. Such a case was *Lee Wilson & Co., Contract Carrier Application* 29 M. C. C. 525, relied upon by appellant. Speaking of applicant's past experiences in that case the Commission said at pp. 530, 531:

The restriction referred to in the *Keystone case*, *supra*, provides (at page 496) that the general form of authority to be granted contract carriers engaged in the particular type of operations discussed in that proceeding should be as follows:

Applicant is hereby authorized to engage in the business of a contract carrier by motor vehicle for the transportation, in interstate or foreign commerce, under special and individual contracts or agreements, with persons (as defined in section 203 (a) of the Motor Carrier Act, 1935), who operate retail stores, the business of which is the sale of food, of the commodities indicated below, over irregular routes between all points in the territory specified below:

Such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses, and, in connection therewith, equipment, materials, and supplies used in the conduct of such business
 * * * (Here specify operating territory).

An analogous situation is not present in the instant case. Such commodities as livestock, logs, lumber, ties, cotton, cottonseed, soybeans and soybean products, corn, corn meal, boxes, and farm implements, among others, will be transported out-bound to Memphis and other markets, and a variety of commodities will be transported in-bound to such business enterprises as grocery stores, a bank, a drug store, an alfalfa-dehydrating plant, a flour mill, cotton gins, a filling station,

and a cotton-oil mill. *The variety of commodities which applicant will be called upon to carry makes it impractical to attempt to narrow this service to a particular class or classes of commodities.* Applicant will, therefore, be authorized to transport general commodities, except certain articles specified in the findings herein which it apparently has not hauled in the past and will not haul in the future. (Italics ours.)

It is worthy of note, also, that the application considered in the above case was for authority to institute a "new" operation and was not presented under the "grandfather" clause.

Indeed, in the absence of a definite showing as to actual or prospective performance it is difficult to see how the Commission could comply with its statutory duty in the grant of permits to "contract" carriers. Section 309 (g) under which it issues such permits instructs it that—

The *business* of the carrier and the *scope* thereof shall be specified in such permit * * *

the "business" of a carrier and its "scope" are determinable from what it has done in the past or as to which it has commitments for the future and not from what it hopes or would like to do.

The "contract" carrier as recognized in Parts II and III of the act is entirely a creature of statute and for a time there was doubt as to whether such a carrier could be brought under regulation. It was recognized, however, that unless he could be regulated and thus brought under control it would be vain to attempt regulation of the common carrier. When the Motor Carrier Act, 1935, was under consideration by the Committees of Congress, Mr. R. H. Aishton, then President of the American Railway Association, testified on March 8, 1932 before the Senate Committee on Interstate Commerce:

Experience of the several States that have attempted to regulate transportation of property by motor

vehicles has demonstrated that unless contract carriers are subjected to appropriate regulations bringing their operations into suitable relation with those of common carriers, any attempted regulation of common carriers is ineffectual and unfair.

We therefore believe that all charter or contract carriers by motor vehicle (as defined in S. 2793; known as the Couzens Bill), of either persons or property, should be subject to regulation. Such regulations should require them to register with the Commission, and upon such registration and proper proof of compliance with the requirements of law they should be entitled to a permit to operate in interstate commerce.

This permit should be issued for a definite period to be prescribed by the Commission.

That such regulation was to be imposed for the protection of common carriers was made clear by the testimony of the late Commissioner Eastman who acted in an advisory capacity to the legislative committees throughout consideration of the legislation. Testifying before the House Committee on Interstate Commerce in connection with the 1935 act, Mr. Eastman said:

So far as the regulation of these private and contract carriers is concerned, it seems to me that the important principle which should govern *and which justifies* any such regulation *is the need for protecting the common carrier who undertakes to serve all the public.* The common carrier is the one, it seems to me, that the Government ought, particularly, *to foster and protect.* Now the contract carrier or private carrier can operate in such a way as to be detrimental, unfairly or improperly, to the interests of the common carrier. To the extent that such conditions exist, the Government is justified in interfering for the sake of *protecting the common carrier;* and it is on that principle that the regulation of the contract carrier in this bill very largely rests. (Italics ours.)

Quite obviously this "protection" would be an empty thing if an applicant for contract carrier rights were to be

given a "roving commission" such as is here claimed, without any regard whatsoever as to the question whether the *existing* service, of common or contract carriers is adequate to meet the reasonable demands of commerce.

The extreme care which the Commission is called upon to exercise in the matter of limiting the operating rights of a "contract" carrier, and the theory that such carriers are not entitled to "free lance" authority is aptly demonstrated by the decision of this Court in *Noble v. United States*, 319 U. S. 88.⁹ That case brought into direct focus the sweep of the mandate of Congress that in granting permits to contract carriers the Commission "shall" specify

The business of the carrier and the scope thereof. . . .

Noble, a *contract* carrier by motor vehicle had engaged during the critical period, in the haulage of certain specified commodities within a definite territory and his patrons had consisted of persons who operate "food canneries or meat-packing businesses." In granting him a "permit" under the "grandfather" clause the Commission had authorized him to

(a) haul all of the commodities handled in the critical period

(b) over all of the routes traversed

but had limited his future dealings to those "who operate food canneries or meat-packing businesses". The case went to the Courts on the contention, as stated by this Court (p. 91):

Appellant's chief objection to that limitation of his rights under the "grandfather" clause is that the Commission has restricted *the shippers or types of shippers*

⁹That case concerned the administration of Part II of the act (Motor Carrier Act, 1935) but the provisions governing the issuance and the form of "permits" are an exact counterpart of those in Part III.

for whom he may haul the specified commodities. His argument comes down to this: once the territory which he may serve and the commodities which he may haul have been determined, he should be allowed to haul these commodities *for any one he chooses* within those territorial limits. (Italics ours.)

The Commission in *Keystone Transp. Co.*, 19 M. C. C. 475, on re-examining its duty to specify "the business of the contract carrier and the scope thereof" had concluded that that phrase meant

more than just the business of *being* a contract carrier within a defined territory. It is all inclusive and connotes in addition to the business of *being* a contract carrier *the exact and precise character of the service to be rendered by such carrier.* (Italics ours.)

Commenting on the views of the Commission in that case this Court said at pages 91, 92:

We agree. An accurate description of the "business" of a particular contract carrier and the "scope" of the enterprise may require more than a statement of the territory served and the commodities hauled. An accurate definition frequently can be made only in terms of the type or class of shippers served. Unless the words of the act are given that interpretation, permits under the "grandfather" clause may greatly distort the prior activities of the carrier. *He who was in substance a highly specialized carrier for a select few would be treated as a carrier of general commodities for all comers*, merely because he had carried a wide variety of articles. That would make a basic alteration in the characteristics of the enterprise of the contract carrier—a change as fundamental as we thought was effected by a disregard of the nature and scope of the holding out of the common carrier in *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 86 L. ed. 971, 62 S. Ct. 722. If the business of the contract carrier were not defined in terms of the type or class of shippers served, that "substantial parity between future operations and prior bona fide operations" which

is contemplated by the Act. (*Alton R. Co. v. United States*, 315 U. S. 15, 22, 86 L. ed. 586, 595; 62 S. Ct. 432) would be frequently disregarded. The "grandfather" clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system; but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935. The result in the present case would be a conversion for all practical purposes of this contract carrier into a common carrier—a step which would tend to nullify a distinction which Congress has preserved throughout the Act. If such a metamorphosis is to be effected or if the appellant is to obtain a permit broader than the actual scope of his established business, the showing required by other provisions of the Act must be made. See 206(a), 207, and 209(b), 49 U. S. C. A. §§ 306(a), 307, 309(b), 10A F. C. A. §§ 206(a), 307, 309(b). (Italics ours.)

At pages 18 and 19 of its Brief herein, appellant undertakes to distinguish the decision in the *Noble Case* but succeeds only in demonstrating that due to the very vague and indefinite pattern of its operation it would be impossible to apply the rule approved in that case. Appellant's contentions simply come to this: Because its operations on the critical date were very circumscribed¹⁰ its authority for the future must be unlimited; because on the critical date it had no contracts covering the transportation of regulated commodities, its future authority must encom-

¹⁰At the hearing (R. 96) this colloquy occurred:

"Q. If the Commission limited your authority to specific commodities rather than general commodities, are you satisfied with the commodities you listed in your Exhibit No. 1?"

A. No sir. I have stated over and over again that the business as reflected in Exhibit No. 1 being the business that was transacted in the five year period, namely, the last five-year period, does not reflect the kind of business we have traditionally done and I further repeatedly stated that any five-year period in our history would not give a general picture of the type of our business.

Q. You are relying on this exhibit to show the character of operation since 1936?"

A. In those five years, yes."

pass all traffic, regulated and unregulated. Stated another way, under the doctrine of the *Noble Case* it is proper and necessary to hold a contract carrier to the precise pattern of the past, but since this appellant had no precise pattern it argues that it must be given authority broader than that enjoyed by any operator on the inland river system.

As so ably pointed out by the late Commissioner Eastman, the contract carrier is under no obligation to serve the public. It is at full liberty to "pick and choose" its traffic. It is ~~not~~ subject to the rule against discrimination. The Commission summed the matter up very forcibly in *Contracts of Contract Carriers*, 1 M. C. C. 628, 631, where it said:

This inherent and inevitable disadvantage of the common carriers is accentuated and becomes a source of positive peril to them when competitors, claiming to be contract carriers, are promiscuous in their dealings with shippers, shop around among them freely, and confine their actual contracts to individual shipments. Under such conditions, shippers, especially those who have a large volume of traffic to offer, may play the contract carrier against the common carrier and contract carriers against each other, with the result that the unfair and destructive competition which Congress sought in the act to abate is instead intensified, particularly in view of the fact that the publication of their specific rates, as required by the act, makes the common carriers open targets. Ultimately, also, such conditions prove detrimental, not only to the carriers, both common and contract, but to the shippers, the public safety, and the welfare of employees.

In the light of such possibilities it would be a serious matter to authorize a "free lance" contract-carrier operation, such as is here proposed, on the entire inland river system even if the proof were convincing. In this case the Commission was asked to make such a ~~thorization~~ without any proof of the handling of regulated traffic during the critical period or without any proved prospect of handling it in the future.

IV.

The Cases Relied Upon by Appellant Afford No Support to Its Position.

The decisions relied upon most heavily by appellant are those of the Commission in *Russell Bros. Towing Case*, 250 I. C. C. 429; in the *Moran Towing & Transportation Company Case*, 250 I. C. C. 541; 260 I. C. C. 269; and in *W-896 Newtex Steamship Company Application* (January 11, 1945, not yet printed).¹¹

The Russell Bros. Case.

In its decision in the above case the Commission (Division 4) found in effect that in determining the territorial scope of an applicant's past operations it is proper to consider both regulated and unregulated traffic. But irrespective of the soundness of this doctrine it has no application in instances where both types of traffic were not handled. A notable example of the application of the latter principle is to be found in the decision in the *Canal Lakes Towing Company Application*, 250 I. C. C. 624, 625, 626, where the Commission said:

Applicant contends that it towed oil during 1939 and 1940 only because the demand for its services in that respect kept its vessels in constant operation, and that it would have sought any business available if its vessels had been available for additional transportation. We have heretofore authorized general towing operations upon a showing that the carrier had held out and performed a general towage service for the public although a large part of the transportation by such carriers on and since January 1, 1940, fell within various exemptions specified in the act or by our orders thereunder. See *Russell Bros. Towing Co., Inc., Common Carrier Application*; 250 I. C. C. 429, and *Moran Tow-*

¹¹We have already discussed the *Wilson Case*, also relied upon in support of the claim for general commodity authority.

ing & Transp. Co., Inc., Applications, 250 I. C. C. 541. In those proceedings, however, it was shown that the carriers had engaged in a *comprehensive towage service* which included the transportation of diversified commodities, including transportation which would be subject to regulation if it were not for our general orders of exemption. The specialized towage of one commodity by applicant on and since January 1, 1940, does not constitute the performance of general towage. (Italics ours.)

Appellant's strategy in bringing forward the *Russell Bros. Case*, is, of course, plain. It hopes first to have itself made subject to the act as a "furnisher of vessels" and, having established that fingerhold, to bring to its aid the doctrine of the *Russell Bros. Case* that both regulated and unregulated activities should be considered in determining rights. The fallacy of the plan lies in the fact that the Commission in referring in that case to both regulated and unregulated traffic, had reference to bulk and nonbulk commodities, as no question of chartering rights was considered in the case. Furthermore, as we have shown, there is a clear distinction as between the contract carrier who carries and the one who is such only by virtue of "furnishing vessels."

The Moran Towing Company Case.

The statement on pp. 13 and 14 of appellant's brief here that

A certificate was issued to Moran, although engaged in service *all of which was exempt* from (sic) the provisions of section 303(b) of the act

is not borne out by the reports of the Commission. Even with respect to transportation on the New York State Canal System where the point that Moran had handled nothing save exempt transportation was most vigorously pressed, the report of the Commission recites that "a substantial number of varied tows have been performed each year by

applicant in that territory." (p. 275) Furthermore, it denied operating authority to Moran as to local traffic on the Great Lakes because (p. 75) "the one service between Toledo and Buffalo was probably exempt under section 303(a)."

The chief distinction, however, as between the *Moran Case* and this is in the characteristics of the two operations. Moran, like the applicant in *Cornell Steamboat Co. v. United States*, — U. S. —, ¹² is what is known in the trade as a "towel." That is to say it tows loaded barges without any official knowledge of the contents of the barge. It was found to be a "carrier" only in the sense that a loaded barge was regarded as "property." The peculiar nature of Moran's business ¹³ was what prompted the Commission to say at p. 272 of its last decision:

At the further hearing applicant submitted detailed evidence of its operations during 1939 and since; and attempted to establish that some nonexempt operations had been performed. *We think it unnecessary in this case to determine whether the services performed were or were not actually subject to the act.* The nature of the cargo in the vessels towed is usually the determining factor as to whether or not the service is exempt, but applicant's towage service is performed without regard to the nature of the cargo loaded in the vessels towed by it. (Italics ours).

Obviously if Moran had been denied a certificate to operate it would have had to *change entirely the character of its business*. That is to say, it would have been compelled to inform itself as to each offer of a loaded barge in order to satisfy itself that it was of an exempt character. The operations of this appellant have nothing in common with the operations of Moran. This appellant knows the nature

¹²Law Ed. Ad. Op. Vol. 88, No. 12, p. 712.

¹³And the business of Russell Bros. was largely of the same nature.

of the commodities handled and bases its charges on the weight thereof. (R. 131-136).

Another distinguishing feature which separates both the *Russell* and *Moran* decisions from that in this case is the fact that both of those operators were found to be common carriers. As such and in the general conduct of their business they held themselves out to transport all freight offered without regard to its nature.¹⁴ In determining the scope of rights to be granted a common carrier it is proper to give considerable weight to the element of holding out, especially if it is consistent with actual performance and coupled with the ability to make it good. But this applicant can find no such refuge because the moment it shows or alleges a general "holding out" it loses its status as a "contract" carrier. (Compare *Noble v. United States*, *supra*).

The Newtex Steamship Company Case.

It is not easy to understand how the appellant can gain any comfort from the decision in the *Newtex Case* or find any support whatsoever for the extravagant statement (p. 24) in its Brief that

The action of the Commission in the *Newtex* . . . case can not be reconciled with its action here.

As the report in that case shows, Newtex had operated a regular common carrier steamship service between New York, on the one hand, and Texas ports, on the other hand, for some 14 years prior to 1940. In the latter year it sold its vessels to the British Government and retired from the trade under such conditions as to forfeit its "grandfather" rights. Later it decided to reenter the trade as soon as

¹⁴At p. 431 of the decision in the *Russell Bros. Case* the Commission stated:

"There is printed on applicant's advertising matter and letter heads an offer to tow "anything—anywhere—anytime."

vessels could be procured and service resumed²⁵ and it filed an application for "new" rights with the Commission. The Commission's report recites the facts that Newtex came before it with a definite proposal to serve definite ports and its application was buttressed by the testimony of many shippers and shipping interests or organizations to the effect that the proposed service would be necessary in the public interest. If this applicant, in support of its application for "new" rights had introduced testimony from prospective shippers to the effect that existing service is inadequate and as to the necessity of entering into "special and individual contracts" with applicant as to specific carriage, the Commission, no doubt, would have given such evidence the same consideration as that accorded in the *Newtex Case*. Instead, appellant chose to rely on "tradition" and on vague and indefinite references to past activities²⁶. Such a presentation offers a poor foundation for an accusation that the Commission acted "arbitrarily and capriciously."

CONCLUSION

The large common carriers referred to by appellant at p. 25 of its Brief are not placed in any "preferred position," as alleged, by the denial of this application. On the contrary they, just as applicant, are in precisely the same position in which the statute found them and the whole theory of the "grandfather" clause, stated by this Court, is the preservation of a "substantial parity between future operations and prior bona fide operations." (*Alton R. Co. v. United States*, 315 U.S. 13.)

If these so-called "large carriers" are in a position to handle general cargo today it is because they handled such cargo in the past. If appellant's denied that right it is be-

²⁵The entire "trade" is closed now because of the War.

²⁶Except, of course, as to the period from 1936 to 1942, during which all of applicant's activities, transportation or otherwise, are noted.

cause it did not so handle it. What this appellant seeks is not the preservation of a "substantial parity" with its past operations but the creation for it of an entirely new operational pattern under which, free of all of the duties and obligations imposed upon common carriers it will be in a position where it can make an "open target" of the most desirable portions of their traffic.

But even if we were to concede, which, of course, we do not, that the intervening and protesting carriers are to have a "preferred position" if the Commission is sustained, such position would be as nothing compared to that which appellant aspires. While the "larger common carriers" would be limited in their operations to definite streams or portions of streams, or ports, appellant could ply the entire system. While the "larger common carriers" would be compelled to publish and adhere to their precise rates, appellant would be free to discriminate and to center its attention only upon the most desirable traffic of the common carriers. Beyond peradventure of doubt the authority which this appellant seeks would be the most valuable authority possible to visualize with respect to river transportation.

Appellant's philosophy seems to be that inasmuch as there is no "five year period in our history" which would "give a general picture of the type of our business" it must, under the law, be given a roving commission to do anything it pleases. True, it had that privilege prior to 1940 and to that extent regulation has come into contact with free enterprise. (Compare *Louisville & N. R. Co. v. Mottley*, 219 U.S. 467.) But prior to 1920, the Pennsylvania Railroad, for example, was at liberty to construct additional lines if it chose to do so. Since 1920, however, it can not do so without first obtaining a certificate of "public convenience and necessity" from the Commission. Prior to 1935, a motor carrier could have plied any highway in the United States so far as Federal restrictions were concerned. Since 1935, however, it has been held to the scope of its *actual* and not its "potential or simulated" service as of the critical date. *McDonald*

v. *Thompson*, 305 U.S. 263. If these "public interest" provisions are not interpreted and applied so as to preserve a "substantial parity" as between the future and the past in connection with "grandfather" rights and to police "new" projects to the end that wasteful and uneconomic duplication of transportation facilities or destructive competition is avoided, then they have no place in the statutes.

The decision of the Commission is sound and the lower Court properly affirmed it. We accordingly request that this Court take similar action.

Respectfully submitted,

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March, 1945.

APPENDIX

PROVISIONS OF THE INTERSTATE COMMERCE ACT RELATING TO, EXEMPTIONS

APPLICATION OF PROVISIONS; EXEMPTIONS

SEC. 303. "(b) Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported, is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended.

"(c) Nothing in this part shall apply to transportation by a contract carrier by water of commodities in bulk in a non-ocean-going vessel on a normal voyage during which (1) the cargo space of such vessel is used for the carrying of not more than three such commodities; and (2) such vessel passes within or through waters which are made international for navigation purposes by any treaty to which the United States is a party.

"(d) Nothing in this part shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service and certified under regulations approved by the Secretary of Commerce pursuant to the provisions of section 4417a of the Revised Statutes (U. S. C., 1934 edition, Supp. IV, title 46, sec. 391a).

"(e) It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported,

their requirement of special equipment, or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II. Upon application of a carrier, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared. A carrier (other than a carrier subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended) making such application prior to October 1, 1940, shall be exempt from the provisions of this part until a final determination has been made upon such application if such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operation of the character in question) except, in either event, for interruptions of service over which such carrier or its predecessor in interest had no control.

“(f) Notwithstanding any provision of this section or of section 302, the provisions of this part shall not apply—

“(1) to transportation by water by a carrier by railroad subject to part I or by a motor carrier subject to part II, incidental to transportation subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services or in the performance of floatage, car ferry, lighterage, or towage; but such transportation shall be considered to be transportation subject to part I when performed by such carrier by railroad, and transportation subject to part II when performed by such motor carrier.

“(2) to transportation by water by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier sub-

ject to part II, or a water carrier subject to this part in the performance within terminal areas of transfer, collection, or delivery services, or in the performance of floatage, car ferry, lighterage, or towage; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental.

(c) Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary to carry out the national transportation policy declared in this Act, the provisions of this part shall not apply (1) to transportation in interstate commerce by water solely within the limits of a single harbor or between places in contiguous harbors, when such transportation is not a part of a continuous through movement under a common control, management, or arrangement, to or from a place without the limits of any such harbor or harbors; or (2) to transportation by small craft of not more than one hundred tons carrying capacity or not more than one hundred indicated horsepower, or to vessels carrying passengers only and equipped to carry no more than sixteen passengers, or to ferries, or to the movement by water carriers of contractors' equipment employed or to be employed in construction or repair for such water carrier, or to the operation of salvors.

"(h) The Commission shall have the power to determine, upon its own motion or upon application of any party in interest, whether any water carrier is engaged solely in transporting the property of a person which owns all or substantially all of the voting stock of such carrier. Upon so finding the Commission shall issue a certificate of exemption to such carrier, and such carrier shall not be subject to the provisions of this part during the period such certificate shall remain in effect. At any time after the issuance of such certificate the Commission may by order revoke such certificate if it finds that such carrier is no longer entitled to the exemption under the foregoing provisions of this subsection. Upon revocation of any such certificate the Commission shall restore to such carrier, without further proceedings, the authority, if any, to engage in transportation

subject to the provisions of this part held by such carrier at the time the certificate of exemption pertaining to such carrier became effective. No certificate of exemption shall be denied and no order of revocation shall be issued, under this subsection, except after reasonable opportunity for hearing.

“(j) Nothing in this part shall be construed to interfere with the exclusive right by each State of the power to regulate intrastate commerce by water carriers within the jurisdiction of such State.”

SUPREME COURT OF THE UNITED STATES.

No. 630.—OCTOBER TERM, 1944.

The Barrett Line, Inc., Appellant,

vs.

The United States of America, In-
terstate Commerce Commission,
et al.

Appeal from the District
Court of the United States
for the Southern District
of Ohio.

[June 18, 1945.]

Mr. Justice RUTLEDGE delivered the opinion of the Court.

The Interstate Commerce Commission denied appellant a permit to act as a contract water carrier under the Transportation Act of 1940, 54 Stat. 898, Part III of the Interstate Commerce Act. A three-judge District Court dismissed the complaint which sought review of that order. The appeal is from this judgment.

In May, 1941, appellant applied for a permit to carry general commodities, with exceptions not now material, between points on the Mississippi River and its tributaries. The authority sought was to "continue an operation in existence January 1, 1940, and continuously thereafter," as a contract carrier of property over irregular routes, pursuant to "grandfather rights" claimed under § 309(f) of Part III. A year later, while the grandfather application was pending, appellant filed another application as a precautionary measure. This sought, in the alternative, leave to perform the same service as a new operation "consistent with the

Section 309(f) provides in part:

"Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: Provided, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g)." 49 U. S. C. § 909(f).

Section 310 relates to dual operation as common and contract carrier, § 311 to temporary operations.

the public interest and the national transportation policy" under § 309(g).²

Protests were filed by other carriers and the two applications were heard together before an examiner in September, 1942. He concluded that the showing did not warrant granting of the grandfather application, but recommended granting of the permit under § 309(g). Division IV however denied both applications, that under § 309(f) for failure to make the required showing of actual operations on and after the crucial date, the one under § 309(g) on the ground that appellant had "failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity require such operation." A petition for reconsideration by the full Commission was denied and the District Court adopted its findings and conclusions in a *per curiam* opinion.

The evidence consisted of exhibits and the testimony of appellant's president, Barrett. The story is of an old-style family institution which, for four generations, has had part in life on the Mississippi and its tributaries. As told by Captain Barrett, the line not only pioneered in the great development of inland water transportation of the middle nineteenth century. Its history has been constantly, during this century, one of pioneering in various fields of water transportation. And thereby, the inference seems justified, hangs the reason for its survival in an age when water transportation, like so much else of industry, has been taken over largely by corporate or governmental enterprise. Now the vicissitudes of regulation have been added to those of competition, appellant urges, to threaten its continuance.

² Section 309(g) provides:

Subject to section 310, upon application the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in this Act. The business of the carrier and the scope thereof shall be specified in such permit and there shall be attached thereto at time of issuance and from time to time thereafter such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier by water, as are necessary to carry out the requirements of this part of those lawfully established by the Commission pursuant thereto: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his equipment, facilities, or service within the scope of the permit, as the development of the business and the demands of the carrier's patrons shall require." 49 U. S. C. § 909(g).

The concern, incorporated in 1926 as successor to individual and partnership forms of operation, remains small. At the time of the hearing it owned twenty-one barges and two towboats, with two derrick boats and other equipment. Cincinnati is the port of registration; Cairo, Illinois, the situs of the fleet by reason of its accessibility to conjunctions of many rivers.

Operations historically have been highly selective and varied in character. Since 1910, at any rate, they have been limited generally to bulk materials, the greater number of which may be subjected to exposure to weather without damage, such as scrap iron, pig iron, fabricated steel, piping, bauxite ore, coal, paving brick, and stone, excluding such items as furniture. At one time or another, however, automobiles, sulphur, powder, grains, salt and petroleum products have been carried. So far as appears the line has not held itself out in this period as a common carrier and does not now seek to become one. Its business has been strictly by special contract, negotiated with reference to the season, the course of the river required for the operation, times of loading and unloading, and other special factors. It is, in other words, an irregular operator performing what it characterizes as "special and sporadic services under special contracts and conditions." The sporadic as well as the special character of the service becomes important, as will appear, for appellant's position on the issues.

The nature of the service and the character of the equipment are correlated. The barges are of steel construction, designed to carry dry or liquid cargo, the latter by adding piping and fittings when required. At the time of the hearing nine had been converted in this way and were used in petroleum traffic, three by appellant and six under charter to the Standard Oil Company of Ohio. Of those remaining, six were under charter, to be converted to petroleum carriers; two were being used in carriage of coal; and four were "available for such use as we put them to." Captain Barrett testified that if the movement of petroleum products should cease the tankers readily could be reconverted for hauling dry cargo.

The service includes freighting, either with appellant's own barges and power or by towing barges owned by others. In addition appellant engages in chartering, including the leasing or chartering of equipment, at times with crew, to others. The

chartering, according to Captain Barrett, involves "wide ramifications," often with difficulty in determining "just who is the operator, whether it is the shipper who is responsible, and therefore, the operator, or whether it is the carrier, who furnishes the equipment."

To establish its right to a permit, whether "grandfather" or "new operation," appellant offered evidence consisting of an exhibit listing all of its operations from January 1, 1936, to August 11, 1942, with information concerning the name of the customer, origin and destination, and nature of the cargo. No effort was made to prove specific operations in similar detail prior to the former date. But a written "Statement of the History, Type and Scope of Operations and Services of The Barrett Line, Inc.," substantiated by the testimony of Captain Barrett, described in a general way the character and scope of such movements.

The general effect of the historical evidence was to show the varied and sporadic character of the operations from about 1910. It appeared that the company might be without contracts or business for intervals of several months at a time. Much of its activity was in the nature of "pioneering trades." In brief this consisted in demonstrating the feasibility of water transportation for particular commodities. Generally, when the demonstration had been made, the result was for the shipper or another to take over the operation and appellant then would await or seek another similar opportunity.³

The evidence, being general in character, was lacking to a large extent in dates concerning specific operations during the latter part of the period; so that for some ten or twelve years prior to January 1, 1936, it is difficult to gather what specific kinds of movements were being made, for whom, between what points and

³ Thus, according to the testimony, the line pioneered in the transportation by water of petroleum in 1912 or earlier; of steel pipes from Pittsburgh in 1920; of powder in the same year; of automobiles to points downstream from Pittsburgh and Cincinnati; of bauxite ore for the Aluminum Ore Company; of paving brick to New Orleans; of riprap stone used by the Engineering corps for paving river banks, etc.

Frequently the demonstration resulted in appellant's supplying equipment to the shipper when the latter took over the business, as, for instance, when the Standard Oil Company of Louisiana purchased boats and barges to continue the demonstrated petroleum operation with its own fleet. Other instances included sales to Atlas Cement Co. and Carnegie Steel Co.

Miscellaneous services also were rendered to other carriers, before and after 1936, including relief of grounded or disabled vessels, raising of sunken vessels, storage of barges or vessels, etc.

with reference to what materials. However, the general inference would seem justified that any suited to the equipment and the rather indefinite criteria used for negotiating contracts were taken when opportunity offered; otherwise the fleet remained idle.

On the other hand, the evidence supplied by the exhibit concerning movements between January 1, 1936, and August 11, 1942, is much more definite. In all instances where the specific character of the cargo is mentioned, except one shipment of fabricated steel and piling in 1936, either stone or petroleum products, including gasoline and furnace oil, exempt commodities, are mentioned. A very considerable number of items designate "Miscellaneous Cargo" and there were some 44 instances noted simply as "charter," without reference to character of the cargo, including in which equipment was leased or chartered to shippers not carriers subject to the Act. A few items specified vessel storage, "damaged barge," steamer aground, furnishing steam and like services to other carriers. In two instances "towing" was specified for "U. S. Engineers."

The "miscellaneous cargo" items largely involved towing loaded barges of other carriers, including the American Barge Line and the Mississippi Valley Barge Line. In some instances Barrett identified the specific cargoes, as, for example, a movement of the former company's barges loaded with scrap iron, sugar and molasses and some of the latter's bearing packaged freight. In such cases, however, since only motive power was furnished, and to another carrier, appellant disclaimed, relying upon the movements "to establish that he [it] is a common carrier of general commodities," but put them in "to show the general sweep and character of the service performed" as a contract carrier. Barrett testified that appellant did not always know what was in such barges, that the charges were on a per diem basis and it therefore made no difference to appellant what was in the barges.

The difference, if any, between this towing and chartering when labelled as such is somewhat nebulous, if indeed it is at all material. But concerning the latter the witness gave similar testimony; that appellant's charges, whether for motive power, barges or both, were on a per diem basis, except in one instance specifying a barrel rate, and that appellant was not concerned with the character of the cargo or where the boats went, although the company's trip sheets, not presented in evidence, would show the latter.

The only evidence, apart from the exhibit, as to operations after January 1, 1940, consisted in Barrett's testimony, summarized above, relating to appellant's equipment and its use at the time of the hearing. This, as may be recalled, related exclusively to transportation of petroleum products, directly or under charter; the use of two barges for carrying coal, the availability of four others "for such use as we put them to."

It should be added that, according to the evidence, one factor inducing the concentration upon petroleum products after 1940 was the effect of the war emergency upon the carriage of these products from southwestern producing fields to central and eastern communities, together with encouragement the line received from officials of the Government to convert its barges into tankers and engage in this business. It seems obvious that, with return to normal modes of transportation as the war emergency passes, and the development of new facilities accelerated by it, the life span of this concentration is likely to repeat appellant's typical "pioneering" performance.

Appellant and the Commission are at odds upon the effects of the showing made concerning movements on and after January 1, 1936, and as to whether the Commission erroneously refused to take account of earlier ones shown by the history prior to that time. The Commission thought that it should disregard them, more particularly with reference to the "grandfather" application, as being too remote to substantiate the claim of "bona fide operation" on the crucial date within § 309(f),⁴ and found that the movements shown after January 1, 1936, were insufficient to establish the claimed rights because all, except one, were of exempt commodities, including petroleum products which were the only ones carried after January 1, 1940, except coal, which also is exempt.

Caught between the upper and nether millstones, so to speak, of denial of "grandfather" rights and a permit for new opera-

⁴ The opinion of Division IV stated: "The term 'bona fide operations' has been interpreted to mean a holding out substantiated by actual operations consistent therewith. Actual operations in order to substantiate a claimed holding out on January 1, 1940, must have been within a reasonable length of time from that date. What constitutes a reasonable length of time may vary with the particular circumstances in each proceeding but one shipment made in 1936 and others at an indefinite period of time prior thereto are entirely too remote to establish bona fide operations on January 1, 1940, and continuously since."

tions,⁵ appellant questions the Commission's limitation of evidence to be considered to that affecting operations after January 1, 1936; its evaluation of the evidence taken into account, particularly that relating to chartering, as showing transportation of exempt commodities only; its interpretation of the statutory provisions in their bearing upon these issues, especially as requiring a showing that chartering operations include nonexempt commodities to justify issuance of a permit; its conclusion that the showing was not sufficient to support the application for "grandfather" rights; and the further conclusions concerning the showing as effecting the application to perform new operations.

The short effect of appellant's position is that the Commission's action has limited it to transportation of exempt commodities only and that, if so limited, grave injury will result for its business. It maintains that, in view of its history and the facts properly interpreted, it is entitled to a permit for the transportation of commodities generally throughout the Mississippi system, including its tributaries, and that the permit preferably should be under the grandfather clause; if not, then for a "new operation."

The controversy has become most crucial in relation to chartering. The Commission found that these activities related, in the crucial period and on the showing made, only to exempt commodities, for carriage of which authority is not required,⁶ and concluded that appellant was therefore not engaged in chartering operations subject to Part III or entitled to a permit for them. The opinion stated: "... the only transportation which might be subject to regulation under part III was that of chartering of vessels to shippers. However, no showing is made as to the nature of the services rendered, the commodities carried in, or the points served with such vessels. On such meager show-

⁵ The grandfather rights were denied, of course, because in the Commission's view, the operations shown to sustain them were too far removed in the past. On the other hand, the permit for new operations was denied, according to its brief, because "appellant proposed no change in mode of operation but planned to continue doing business as in the past."

⁶ Exemption is provided by § 303 for various kinds of transportation including, under limitations specified, carriage of bulk commodities when the vessel is used to transport not more than three, § 303(b); carriage of liquid cargoes in bulk in certified tankers, § 303(d); transportation solely within the limits of a single harbor, § 303(g).

The Commission has uniformly denied permits or certificates where only exempt transportation is involved. Cf. *Upper Mississippi Towing Corp.*, Common Carrier Application, 260 I. C. C. 292, 293; *Gallagher Bros. Sand & Gravel Corp.*, Contract Carrier Application, 260 I. C. C. 224, 225.

ing we would not be warranted in finding that applicant, on January 1, 1940, and continuously since, was engaged in chartering operations subject to part III of the act."

Appellant attacks this finding and the conclusion as contrary to law. The argument is founded upon § 302(e), which defines "contract carrier by water" and provides that the furnishing of a vessel under charter or lease to a person other than a carrier subject to the Act, for use in transporting the latter's property, shall be considered to constitute "engaging in transportation" within the meaning of the definition of "contract carrier by water."

Although it is true that no permit is required if only exempt commodities are carried in chartered vessels, appellant construes § 302(e) to entitle it to a permit if on the crucial date it was engaged in bona fide chartering operations, without regard to whether the commodities actually carried were exempt or non-exempt. In this view the Act is not concerned, so far as it relates to chartering, with the character of the commodity, but takes account only of the furnishing of the vessel; and the Commission, by requiring a showing as to the nature of the commodity, added a requirement not included or authorized by the statute.

Accordingly, since the evidence clearly disclosed numerous charter operations within the critical period, appellant draws two conclusions: (1) that it was entitled to grandfather rights for chartering as such, and to a permit for such operations which would allow it to charter vessels for carriage of nonexempt as well as exempt cargo, without reference to its character in this respect; and (2), this being so, it was "engaged in transportation" of both exempt and nonexempt commodities on the critical date and therefore, under the Commission's rulings relating to such situations,

7 Section 302(e) in pertinent part is as follows:

"The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

"The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water.'" 49 U. S. C. § 902(e).

was entitled to a permit authorizing not only chartering but also transportation of commodities generally.

Appellant relies especially upon the Commission's decision in *C. F. Harms Company, Contract Carrier Application*, 260 I. C. C. 171, rendered January 4, 1944, after the complaint had been filed in this case;⁸ with emphasis also upon *Russell Bros. Towing Case*, 250 I. C. C. 429, and *Moran Towing & Transportation Company Case*, 250 I. C. C. 541; 260 I. C. C. 269.

In these cases permits were granted either to a "furnisher of vessels" or to towers without limitation as to commodities on the basis of such a holding out, except that in the *Moran* case the tower had no official knowledge of the contents of the loaded barges. Appellant regards these decisions as inconsistent with the Commission's action in this case. The Commission distinguishes them, however, on the basis that the evidence disclosed operations affecting both exempt and nonexempt goods. The intervening protestants characterize appellant's "strategy," particularly in its reliance upon the *Russell Bros. Case*, as follows: "It hopes first to have itself made subject to the act as a 'furnisher of vessels' and, having established that fingerhold, to bring to its aid the doctrine of the *Russell Bros. Case* that both regulated and unregulated activities should be considered in determining rights."

If the Commission's premise were valid, that a ~~furnisher of vessels~~ must show, as of the critical date, that his operations included nonexempt commodities or, as its opinion stated, "the nature of the services rendered; the commodities carried in, or the points served with such vessels," we would nevertheless be in doubt concerning the validity of its ruling that no sufficient showing was made in this case.

Appellant's exhibit disclosed 43 or 44 chartering operations in the period taken by the Commission as evidential, designated simply as "charter." All but two specified Cairo, Illinois, as both origin and destination. In the brief it is suggested these were therefore exempt under § 303(g) relating to transportation in a single harbor. The suggestion flies flatly in the face of the contradicted testimony given by Captain Barrett that Cairo

⁸ Three decisions were rendered in the *Harms* matter. The first gave authority to furnish vessels limited to scrap iron and to specified ports, 250 I. C. C. 513; the second removed the commodity limitation, 250 I. C. C. 685; the third, by the full Commission, removed the "territorial" limitation, 260 I. C. C. 171.

was designated in these instances because it was the situs of the fleet, appellant was chartering or leasing the equipment on a per diem basis, was therefore not interested in the contents or character of the cargo or where the vessel went, and that these operations were not confined to the Cairo harbor but that point was designated because it was the place where the movement began and the equipment was delivered when it ended. The effect of this evidence is not nullified, as seems to be suggested in the brief, because the witness also testified that the chartered vessels were run with appellant's crews, the masters were handed manifests disclosing the cargoes carried, and the trip sheets would reveal where the vessels went. Any other than the most rigid construction would regard these facts as supporting, rather than impairing, the claim of engaging in general chartering operations without limitation to exempt commodities or particular points of loading and unloading.

Similar restrictive inferences are drawn in the brief to support "probable exemptions" in nearly all the other instances of chartering, including six in 1937 as "too remote" though within the period considered. Of these some 19 or 20, relating to chartering to other carriers subject to regulation, seem justified. But with them eliminated, 23 instances of chartering to shippers who were not carriers remain to support the claim. We are unable to accept the view that they constituted so meager a showing as to justify on this ground withholding a permit for chartering.

In the *Moran* case the Commission said:

We think it unnecessary in this case to determine whether the services performed were or were not actually subject to the act. The nature of the cargo in the vessels towed is usually the determining factor as to whether or not the service is exempt, but applicant's towage service is performed without regard to the nature of the cargo loaded in the vessels towed by it. 260 I. C. C. 269, 272.

In the *Russell Bros.* case the Commission stated, with reference to the definition of a common carrier by water in Part III and the "grandfather" requirement of bona fide operation on the critical date:

It will be noted that in neither instance is there any reference to whether the transportation performed by the carrier is or is not subject to regulation. In determining a carrier's status and the scope of its operations during the "grand-

father" period, its entire operation should be considered, and not merely that part which the Congress has seen fit to make subject to regulation. To find that "grandfather" rights may be granted only to the extent that a showing is made as to the performance of regulated transportation requires ~~the~~ reading into the law of language which, in fact, is not there. 250 I. C. C. 429, 433-434.⁹

Notwithstanding the Commission's insistence that these cases are distinguishable, as resting upon different showings, it is difficult to accept that view if as the *Moran* opinion indicates, the crucial fact to be shown is performance of service "without regard to the nature of the cargo loaded in the vessels towed by it." The conclusion is even more difficult if, as the *Russell Bros.* opinion states, "To find that 'grandfather' rights may be granted only to the extent that a showing is made as to the performance of regulated transportation requires reading into the law of language which, in fact, is not there."

This statement applies equally to the comparable statutory provisions relating to contract carriers. Cf. *C. F. Harris Co., Contract Carrier Application*, 250 I. C. C. 685; 260 I. C. C. 171. Section 309(f) does not in terms require that such a carrier, to be entitled to "grandfather" rights, must have been engaged in the transportation of commodities which are nonexempt. It may be conceded that such a limitation properly may be implied from the requirement of substantial parity between operations on the critical date and those for which a permit is sought, as to other forms of transportation than the furnishing of vessels as defined in § 302(e). Cf. *Alton R. Co. v. United States*, 315 U. S. 15, 22; *Noble v. United States*, 319 U. S. 88, 92. But it does not follow that the same limitation applies to "the furnishing for compensation (under charter, lease, or other agreement) of a vessel" under that section. It defines the act of furnishing, to shippers other than regulated carriers, as "engaging in transportation" within

⁹ The opinion continued: "This matter is particularly important in instances like the present where an applicant is seeking a certificate covering all commodities, or general cargo. Obviously no carrier actually transports all commodities, and therefore the bona fides of an applicant's operations depend on the representative character of the transportation performed. It may well be that the carrier holds itself out to, and actually does, transport all traffic offered to it from and to all points covered by its application; but that the great bulk of such transportation is exempt from regulation. It seems clear that if we shut our eyes to all of applicant's transportation except that which is subject to regulation, we get an incomplete and distorted picture of the nature and extent of its operations. To place limitations upon 'grandfather' rights predicated upon that view would be unjust and unreasonable, and is not contemplated by the law." 250 I. C. C. 429, 434.

the meaning of "contract carrier by water" as that term is used in the section. If the purpose was to treat this form of water operation identically with others covered by the general definition, the purpose and utility of the special provision concerning furnishing become obscure if the provision does not in fact become wholly ineffective.

The chartering or leasing of vessels and equipment is not so obviously similar to or identical with actively "engaging in transportation" that, without specific provision for coverage, it necessarily would be included within that of the more general definitions and provisions. Quite different modes of operation, physically and in business management, as well as responsibilities, conceivably if not also generally, give the activity materially different characteristics from the carrying of goods in the more conventional sense. Congress obviously sought to bring these operations within the regulatory scheme by the special provisions.

In doing so we do not think it had in mind the purpose to draw a sharp line between ~~charterers~~ carrying only exempt commodities and those carrying nonexempt ones. That is true, notwithstanding the fact that one engaging in chartering affecting only the former is no more required to secure a permit than one engaging in other forms of transporting exempt commodities.

The legislative history shows that the original counterpart of the "furnishing" provision of § 302 (e) extended to the furnishing of a vessel "to another person" rather than "to a person other than a carrier subject to this Act" as it now stands. This met with vigorous opposition on the ground that an owner supplying equipment to another carrier would become subject to the Act; thus possibly imposing upon him responsibility for the charges of the lessee, or other person performing the operation, for performing it and for those operations, over which of course the ~~charterer~~ would not have control. It was feared this might destroy a large amount of chartering activity, including both inter-coastal and inland waterway business, conducted then with a high degree of flexibility. Cf. 84 Cong. Rec. 9709; id. 9979. Emphasis was placed in the discussion upon the freedom of railroads acting under Part I, and of motor carriers, under Part II, to lease surplus equipment without becoming responsible as regulated carriers for its use; and upon the common practice of barge lines and other water carriers to lease equipment freely and for long or short periods of time on open markets. *Ibid.*

furnishers of vessels

owner

To meet the objections an amendment was offered in the House to make the original proposal read: "... a person which furnishes a vessel ... shall itself not be considered to be engaged. ...". 84 Cong. Rec. 9979. Had this finally been adopted, chartering would have been wholly exempt. The final form of the bill struck out the word "not" and substituted the present provision. The Conference Report states, in addition to the purpose to limit application to cases where the vessel is furnished to a person other than a regulated carrier, the intention to clarify the language "to make sure that the person furnishing the vessel will not simply by reason of furnishing the vessel, become a contract carrier subject to part III of the act as to that part of its business not related to the furnishing and use of the vessel." (Emphasis added)

This seems obviously to contemplate that chartering or the defined furnishing of equipment is to be regarded and treated as in a separate category from other forms of chartering in regulated activity; and that the one furnishing the vessel by that act would become a "contract carrier subject to part III" as to that part of the business, unless the vessel were furnished to another carrier. This conclusion is further supported by the fact that § 802 (e) in terms takes account of the character of the property to be so transported in the language "to be used by the person to whom such vessel is furnished in the transportation of its own property."

This limitation takes no account of the distinction between exempt and nonexempt commodities. Had Congress intended that line to be drawn rigidly to require showing of chartering for carriage of nonexempt goods in order to establish grandfather rights, that purpose, we think, would have been clearly expressed. Its concern in this provision was not with that line. The obvious purpose was to secure full regulation of the traffic by application of the Act's provisions to the lessee, if he should be a regulated carrier, thus exempting the lessor in that situation otherwise to the lessor.

In providing for the alternative incidence of coverage Congress recognized that in chartering the character of the commodity as being exempt or not exempt was more the concern of the lessee than of the lessor or charterer. The latter's concern was with the furnishing of the vessel as such and with whether

the "lessee" was a regulated carrier. To regard the Act as imposing the further limitation that the ~~charterer~~ also must have regard to the character of the cargo would cast that activity, intended to be kept flexible, as the legislative history shows, into a more rigid regulatory mold than other forms of transportation covered either by Part III or by Parts I and II.

Accordingly we think the Commission erred in concluding that appellant was not engaged in chartering operations subject to Part III on the critical date, for failure to show "the nature of the services rendered, the commodities carried in, or the points served with such vessels." This conclusion, moreover, seems to be in accord with its own decision in the *Harms* case and in harmony with the principles followed in the *Moran Towing* case and that of *Russell Bros.*¹¹

The Commission urges however that we are not concerned simply with inconsistencies in its decisions, since evidence varies with cases and to its informed judgment is confided the primary duty to make appropriate applications of the Act. We respect that judgment and that obligation. But the matter now involved goes beyond mere apparent inconsistency in the statute's application. Seemingly there has been a basic difference of opinion within the Commission itself concerning the necessity for proof showing the character of the commodity, as exempt or nonexempt, to establish grandfather rights to chartering operations and also as to the character of the proof required. This appears from the fact that two of the three Commissioners who participated in the decision by Division IV in this case dissented from the full Commission's decision in the *Harms* case and one of them in the *Moran* case.

With full respect for the dissenting judgment, we think the view eventually reached by the majority in those decisions accords with the statutory purpose and provision.¹² The dissenting Commis-

¹¹ See, however, *W-764, Upper Mississippi Towing Corp., Common Carrier Applications*, decided May 3, 1944.

¹² It is suggested by the protesting intervenors, that appellant has failed to exhaust its administrative remedy by neglecting to apply a second time for reconsideration by the Commission after the final *Harms* decision, cf. note 8, although it was rendered after the complaint was filed in this case. The suggestion, if followed generally, conceivably could result in keeping applicants running back and forth between court and commission, if not indeterminably, then to an extent certainly not contemplated by the exhaustion doctrine. Appellant fulfilled the requirements of that doctrine by its application for reconsideration made to the entire Commission and its denial of the petition.

signers emphasize the requirement of § 309(g) that a permit shall specify the business of the contract carrier and the scope thereof; and regard this as qualifying the "furnishing" provision of § 302(e) so as to require substantially the same specific showing as to character of the commodities and territorial scope of operations in chartering as has been deemed required for other forms of transportation. Without this, they say, the substantial parity between future operations and prior bona fide operations contemplated by the grandfather provisions cannot be maintained.

The policy of maintaining that parity by adequate standards of proof is sound, although "the Act is remedial and to be construed liberally." *McDonald v. Thompson*, 305 U. S. 263, 266; *Crescent Express Lines, Inc. v. United States*, 320 U. S. 401, 409. The policy, however, may be defeated by too strict an application in particular cases, more especially it would seem in relation to water carriers whose operations, in contract carriage at any rate, are more generally irregular and spasmodic than in the case of other carriers. The Court has said, even in relation to the latter: "The Commission may not atomize his prior service, product by product, so as to restrict the scope of his operations where there is substantial evidence in addition to his holding out that he was in 'bona fide operation' as a 'common carrier' of a large group of commodities or of a whole class or classes of property. There might be substantial evidence of such an undertaking though the evidence as to any one article was not substantial." *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 483, 484.

This language has particularly appropriate application to the proof made in this case, at any rate in relation to the chartering operations, in so far as proof may be required for compliance with the requirements of § 309(g). Beyond this, it bears also upon the extent to which these requirements are to be taken as qualifying § 302(e). To consider them as doing so in a manner to require the chartering carrier to prove specific instances of nonexempt commodity carriage would molecularize, if not atomize, the chartering business and threaten, if not accomplish, the destruction anticipated in the congressional debates. That result, or one tending strongly toward it, as would such a construction, hardly can be taken to be consistent with the de-

clared national transportation policy "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each" or the further declaration that this policy is to be applied in enforcing *all* of the Act's provisions.¹³ Spasmodic operation hardly would be regarded as an inherent advantage of rail or perhaps of motor service in general. It is, or may be, the most valuable inherent advantage of a contract water carrier.

It follows that the judgment must be reversed as to the chartering phase of appellant's operations.

In view of what has been said, particularly with reference to the varied and spasmodic character of appellant's operations, and the policy of maintaining these as an inherent advantage of water transportation, our judgment might differ from the Commission's as to the sufficiency of the showing made as it related to other operations than chartering and, in view of that showing, as to the necessity or propriety of limiting the period of operations considered, in relation to the claim of grandfather rights, to that following January 1, 1936.

Nevertheless, our views in these respects are not to be substituted for the Commission's which is not only specially informed but broadly discretionary and controlling except in case of clear departure from statutory requirements. Apart from the chartering, we are unable to say there was such a departure in this case. The policy of the Commission has recognized that a somewhat more liberal attitude is required in the case of water carriers than with respect to others in the length of the period to be considered as establishing the claim of bona fide operation.¹⁴ Moreover, as has been stated, the evidence relating to the latter part of the period prior to 1936 was rather more vague than that affecting both earlier and later periods. In view of these facts we cannot say that the Commission erred in its findings or conclusion that

¹³ Cf. Oppenheim, *The National Transportation Policy and Inter-Carrier Competitive Rates* (1945) 27 ff.

¹⁴ Compare *Moran Towing & Transp. Co., Inc., Applications*, 260 I. C. C. 269, 273; *Thames River Line, Inc., Common Carrier Application*, 250 I. C. C. 245; and other cases in the latter volume at pp. 106, 117, 179, 353, 370 and 599, with, e. g., *Jack Cole Co. v. United States*, 41 M. C. C. 657, 59 F. Supp. 10, affirmed per curiam, 324 U. S. —; *Gregg Cartage Co. v. United States*, 316 U. S. 74.

appellant was not entitled, on the showing made, to a permit for grandfather operations other than those involving chartering.

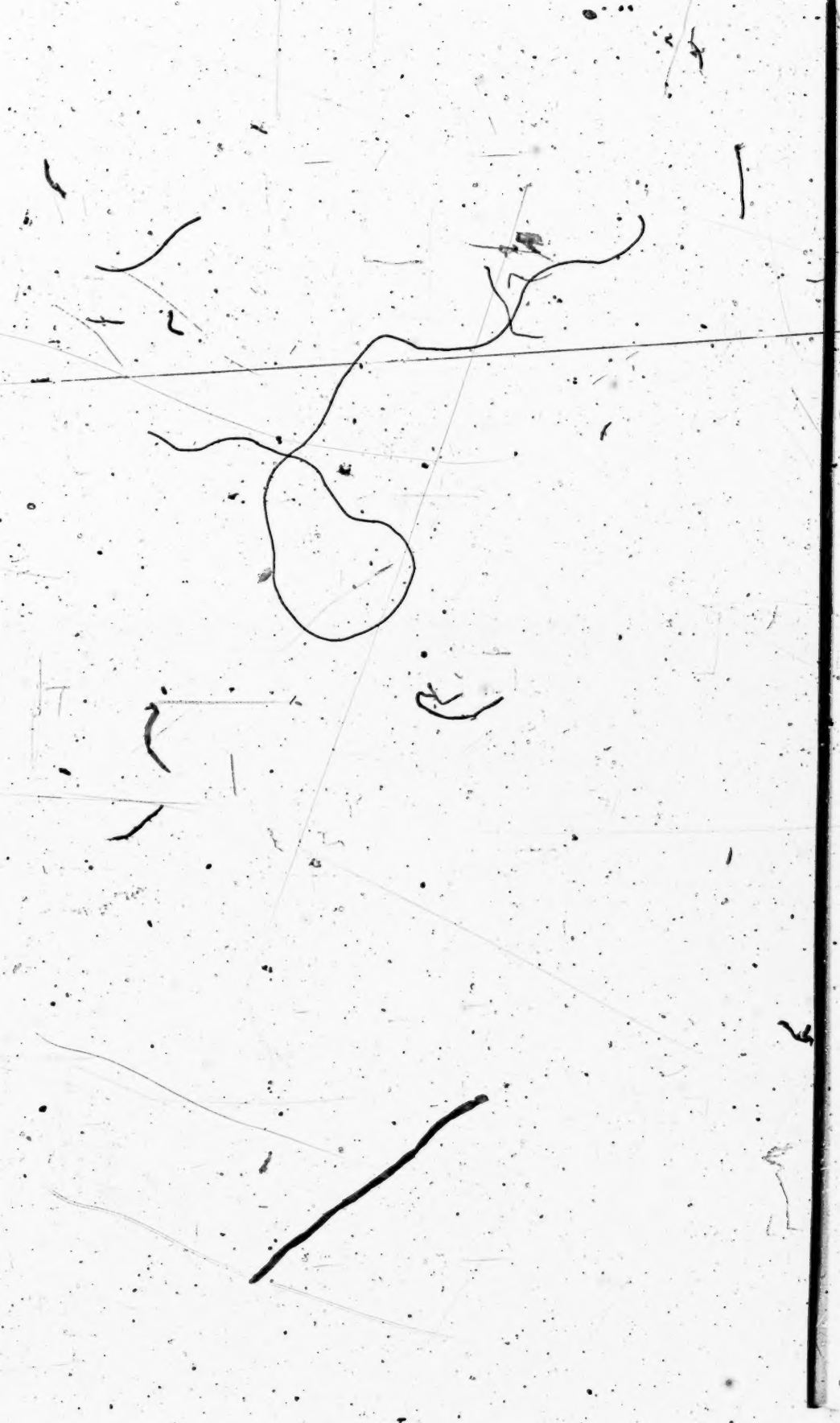
In this phase of the case it is necessary only to add that in view of the specific statement contained in the Conference Report quoted above,¹⁵ appellant is not entitled to found grandfather rights to transportation other than chartering upon a showing only of chartering operations.

We think too that it would be an invasion of the province of the Commission for us to interfere with its action in finding that appellant upon the showing it made was not, at the time of the application, entitled to a permit for a new operation. It is true that its confinement, since about 1940, to operations substantially, if not exclusively, in transportation of petroleum products has been induced, according to the proof, by the war emergency; and that this business in all probability will terminate with the emergency's end. It is likewise true that appellant's equipment can be converted readily for other uses when that occurs and, unless authority is obtained to conduct operations upon a scale sufficient to enable appellant to employ it profitably, the business may be forced to close or required to operate uneconomically. Nevertheless, in view of the failure to make specific showing of some immediate prospect of entering upon new and nonexempt operations, and of the range and weight of the Commission's discretion in relation to such applications, we are not at liberty to interfere with its action.

The Commission has suggested, in the brief, that upon another application, accompanied by a sufficient showing of intended "new operations," the desired permit may be granted. No doubt, in such an event, the application will be considered in the light of the Act's injunction of "fair and impartial regulation" so administered as to recognize and preserve the inherent "advantages" of the type of transportation in which the Barrett Line has been engaged through four generations of river life.

The judgment is affirmed as to operations other than chartering; as to them, it is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

¹⁵ Cf. text at note 10.



SUPREME COURT OF THE UNITED STATES.

No. 630.—OCTOBER TERM, 1944.

The Barrett Line, Inc., Appellant,

vs.

The United States of America, Interstate Commerce Commission and Mississippi Valley Barge Line Co., et al..

Appeal from the District Court of the United States for the Southern District of Ohio.

[June 18, 1945.]

The CHIEF JUSTICE, Mr. Justice ROBERTS, Mr. Justice FRANKFURTER, and Mr. Justice JACKSON, dissenting.

The Court, in rejecting the refusal of the Interstate Commerce Commission to grant a permit as a contract carrier by water for charter purposes, is greatly influenced by an alleged conflict in the Commission's determinations. Compare *C. F. Harms Co., Contract Carrier Application*, 260 I. C. C. 171; *Russell Bros. Towing Co., Inc., Common Carrier Application*, 250 I. C. C. 429; *Moran Towing & Transportation Co., Inc., Applications*, 260 I. C. C. 269, with *Upper Mississippi Towing Corp., Com. Car. Applications*, 260 I. C. C. 292. Assuming such a conflict, it is our business to deal with the case now here and not to be concerned with apparent inconsistencies in administrative determinations. If the Commission has kept within the bounds of the statute in this case, its order should be sustained. We think that the interpretation of § 302(e) made by the Commission was proper. Certainly, the construction of this provision involves considerations so bound up with the technical subject matter that, even though the neutral language of the statute permits, as a matter of English, the construction which the Court now makes, the experience of the Commission should prevail. Compare *Gray v. Powell*, 314 U. S. 402.